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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1951

CERTIORARI GRANTED JANUARY 2, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KONRAD G. JOHANSEN, Libelant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellee

STATEMENT UNDER RULE 15(b)

This proceeding was commenced by the filing of the libel on February 8, 1950. Respondent filed an answer to the libel on August 23rd, 1950.

The respondent's motion to dismiss the libel and the libelant's motion for a discovery and inspection were argued, before Hon. Edward A. Conger, D. J., on October 17, 1950.

The memorandum dismissing the libel was filed on December 6, 1950. The memorandum rendering plaintiff's motion moot was filed on December 6th, 1950.

The order dismissing the libel was filed on December 18th, 1950, and the unsigned order was filed on December 18th, 1950.

The order allowing appeal was filed on January 18th, 1951. The assignment of errors was filed on January 25th, 1951.

The parties and attorneys are the same as at the commencement of the action.

[fol. 2] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AD. 164-4

KONRAD G. JOHANSEN, Libellant,

against

UNITED STATES OF AMERICA, Respondent

NOTICE OF APPEAL AND ALLOWANCE

SIR:

Please take notice that Konrad G. Johansen, the libellant in the above entitled suit, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree and order of this Court entered herein on or about the 18th day of December, 1950 dismissing the libel herein, and from the final order of this court entered herein on or about the 18th day of December, 1950, denying the libellant's motion for a discovery and inspection on the ground that same has become moot in view of the Court's determination dismissing the libel herein, and from this Court's refusal to sign the counter-order submitted by the libellant so that the record herein might be complete, and from each and every part of said decree, order and determination of this Court.

Dated: New York, New York, January 17, 1951.
Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York 7, New York.

[fol. 3] To Irving H. Saypol, Esq., Proctor for Respondent, 45 Broadway, New York, New York.

CLERK OF THE UNITED STATES DISTRICT COURT,
Southern District of New York:

The above appeal is hereby allowed.

Dated: New York, New York, January 18, 1951.
Alfred C. Coxe, U. S. D. J.

Filed January 18, 1951.

UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 25, 1951

Libellant hereby assigns error in the final decree of this Court entered herein on or about the 18th day of December, 1950, dismissing the libel herein, and in the final order entered herein on or about the 18th day of December, 1950, denying libellant's motion for a discovery and inspection, and in the determination of this Honorable Court in refusing to sign the counter-order submitted by the libellant in the above entitled suit so that the record herein might be complete, as follows:

[fol. 4] 1. The District Court erred in dismissing the libel.

2. The District Court erred in holding that the libellant had "elected" to accept compensation benefits, thereby waiving his right to sue the respondent for damages for personal injuries occasioned by the fault of the respondent.

3. The District Court erred in holding that the mere filing of a claim for compensation by a civilian seaman, and his receipt of compensation thereafter, constitutes an effective election, where his employer is the United States of America.

4. The District Court erred in failing to hold that a seaman cannot elect to waive his right to sue for damages for personal injuries based on the fault of the respondent, as his employer, unless he has first been made aware of his legal rights in the premises.

5. The District Court erred in failing to deny the respondent's motion to dismiss the libel.

6. The District Court erred in denying the libellant's previous motion for a discovery and inspection.

7. The District Court erred in refusing to sign the counter-order submitted by the libellant, so that the record herein might be complete.

Dated: New York, New York, January 17, 1951.

Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York, New York.

[fol. 5] To William V. Connell, Clerk; Irving H. Saypol, Esq., Proctor for Respondent, 45 Broadway, New York, New York.

UNITED STATES DISTRICT COURT

LIBEL—February 6, 1950

Suits Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees for the Enforcement of the Laws of the United States, Common and Statutory for the Protection of and for the Health and Safety of Seamen at Sea

Libellant, for his libel, by his proctor, William L. Standard, respectfully alleges:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and still is a sovereign power which has by law consented to be sued.

Second: That at all the times hereinafter mentioned, respondent owned, operated and controlled a certain vessel known as the U. S. A. T. *Kingsport Victory*.

[fol. 6] Third: That at all the times hereinafter mentioned, and more particularly during the month of August, 1949, libellant above named as well as the seamen and officers comprising the crew of the U. S. A. T. *Kingsport Victory* were in the employ of the respondent.

Fourth: That at all the times hereinafter mentioned, the U. S. A. T. *Kingsport Victory* was a public vessel flying the flag of the United States.

Fifth: That on or about August 5, 1949, while the libellant was in the employ of the respondent as a seaman on the U. S. A. T. *Kingsport Victory* he was caused to sustain serious injuries to his right leg and other parts of his body, while he was working in the vicinity of the 'tween deck of the No. 4 hatch aboard the vessel, when certain lumber was caused to collapse, all by reason of the negligence of the respondent and the unseaworthiness of the vessel.

Sixth: That by reason of all of the foregoing, libellant became sick, sore, lamed and disabled and sustained severe and permanent injuries, and was and is internally and externally injured causing him to suffer great pain and for a long time he was and will be prevented from attending to his daily labers, thereby losing large sums which he would otherwise have earned as wages, and has expended

sums of money in endeavoring to be cured of his injuries aforesaid and to maintain himself, and has endured and will continue to endure great pain and suffering, all to his damage.

Seventh: That all and singular the foregoing matters are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 7] Wherefore, libellant prays that respondent be required to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libellant's claim for damages, wages, maintenance and cure in the sum of $25,000, together with the costs and disbursements of this action.

William L. Standard, by Louis R. Harolds, a Member of the Firm, Proctor for Libellant, 38 Park Row, Borough of Manhattan, City of New York.

(Duly verified February 6, 1950.)

UNITED STATES DISTRICT COURT

ANSWER—August 23, 1950

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the respondent, United States of America, to the libel of Konrad G. Johansen, alleges upon information and belief:

First: It admits that, at the times mentioned in the libel, it was a sovereign but denies that it has consented to be sued on the cause of action described in the libel.

[fol. 8] Second: It admits the truth of the allegation contained in Article Second.

Third: It admits the allegations contained in Article Third.

Fourth: It admits the allegations contained in Article Fourth.

Fifth: It denies the allegations contained in Article Fifth.

Sixth: It denies the allegations contained in Article Sixth.

Seventh: It denies the allegations contained in Article Seventh.

Further answering the libel herein the respondent says:

Eighth: At the times mentioned in the libel, the United States Army Transport *Kingsport Victory* was owned by the respondent and was a public vessel of the United States within the meaning of the Public Vessels Act, 46 United States Code, Section 781 et seq. At the time of the injuries complained of, the libelant was an employee of the United States aboard such vessel and entitled to the benefits provided by the United States Employees' Compensation Act, 5, United States Code, Section 751 et seq. On or about the 8th day of November, 1949, libelant filed a claim for compensation benefits under said Act and in addition to receiving medical treatment without charge to him, was paid compensation from the 9th day of August, 1949, through the 6th day of November, 1949, in the amount of $358.20, thereby electing to receive the benefits of said Act.

[fol. 9] Ninth: The only remedy available to the libelant was that provided by the United States Employees' Compensation Act and this suit is, therefore, one against United States of America without its consent and outside the scope of the Public Vessels Act.

Further answering the libel herein the respondent says:

Tenth: Such injuries as were sustained by the libelant were due solely to and were caused by the libelant's own negligence and were not caused or contributed to in any manner by negligence of the respondent.

Further answering the libel herein the respondent says:

Eleventh: If the libelant was injured as described in the libel, his injuries resulted from risks and dangers which were open, obvious and apparent, which he fully understood and which he assumed when he became a member of the crew of the United States Army Transport *Kingsport Victory*.

The premises are true.

Wherefore, respondent prays that the libel herein be dismissed with costs.

Irving H. Saypol, United States Attorney, Proctor for Respondent, 45 Broadway, New York 6, N. Y.

(Duly verified August 23, 1950.)

[fol. 10] UNITED STATES DISTRICT COURT

RESPONDENT'S NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavit of Martin J. Norris, a motion will be made at a Stated Term of this Court for the hearing of motions, to be held in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 26th day of September, 1950 at 10:30 A. M., or as soon there after as counsel can be heard, for an order dismissing the above-entitled action on the ground that the libel fails to state a claim against respondent upon which relief can be granted or in the alternative that the Court hear and determine upon the hearing of this motion and in advance of trial the issues relating to the libelant's election to accept Federal employee's compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel and for an order to give effect to such determination.

Yours, etc., Irving H. Saypol, United States Attorney, Proctor for Respondent, 45 Broadway, New York 6, N. Y.

To William L. Standard, Esq., Proctor for Libelant, 38 Park Row, New York 7, N. Y.

[fol. 11] AFFIDAVIT OF MARTIN J. NORRIS, READ IN SUPPORT OF MOTION

STATE OF NEW YORK:
County of New York, ss:

Martin J. Norris, being duly sworn, deposes and says:

That he is Attorney, Department of Justice, and a Special Assistant in the office of Irving H. Saypol, Esq., United States Attorney for the Southern District of New York, Admiralty Division, and that he has been assigned the above-captioned case.

This affidavit is in support of a motion to dismiss the libel on the ground that it fails to state a claim against respondent upon which relief can be granted.

Libelant alleges that on August 5, 1949, while he was a seaman aboard the United States Army Transport *Kingsport Victory*, in the capacity of carpenter, he received certain injuries to his right leg when a wooden sheathing in the No. 4 hold collapsed as libelant was prying it apart. Johansen received first aid treatment and was then taken to the United States Marine Hospital at Staten Island. He was discharged on October 24, 1949, as fit for duty with recommended convalescence of fourteen days.

On October 13, 1949, Johansen made application to the Federal Security Agency, Bureau of Employees' Compensation, for compensation payments as a result of the injury which he sustained. An award was made to Mr. Johansen by the Bureau of Employees' Compensation and on November 30, 1949, by the U. S. Treasury check number 89,462,874 in the amount of Two Hundred Twenty-one and [fol. 12] 65/100 ($221.65), said payment was made to him. On December 28, 1949, a further payment in the amount of One Hundred Thirty-six and 55/100 ($136.55) was made and this payment was by means of U. S. Treasury check number 89,707,025. A certified copy of the General Accounting Office file regarding payments made to Johansen will be submitted to this Honorable Court at the hearing of the motion. The said file will show photostatic copies of the cancelled checks in question as well as the accounting records of the paying office.

It is respectfully submitted that libelant having filed a

claim under the Federal Employees' Compensation Act, and having received and accepted compensation, has elected his remedy and has surrendered any right of action he may have had against the United States for the injury sustained.

It is respectfully submitted that the libel does not state a cause of action against the United States of America under the Public Vessels Act (46 U. S. C. § 781 et seq.) or the Suits in Admiralty Act (46 U. S. C. § 741 et seq.) or any other act, and deponent prays that the said libel be dismissed.

Martin J. Norris.

(Sworn to September 14, 1950.)

[fol. 13] UNITED STATES DISTRICT COURT

LIBELLANT'S NOTICE OF MOTION FOR DISCOVERY AND INSPECTION

SIR:

Please take notice that on the annexed affidavit of Louis R. Harolds, sworn to the 14th day of September, 1950, and upon the pleadings and all proceedings heretofore had herein, the undersigned will move this Court on the 26th day of September, 1950, at the Court House located at Foley Square, New York, New York, at Room 506, at 10:30 A. M. of that day, or as soon thereafter as counsel can be heard, for an order granting the Libellant a discovery and inspection, with permission to make copies of the libellant's Federal Employees' Compensation file, medical records, abstracts, witnesses' reports, and accident reports, relating to injuries which the libellant sustained while in the employ of the respondent as a seaman on the U.S.A.T. *Kingsport Victory*, and for such other and further relief as may be just in the premises.

Dated: New York, New York, September 14, 1950.

Yours, etc., William L. Standard, Proctor for Libellant, 38 Park Row, New York, New York.

To: Irving H. Saypol, Esq., United States Attorney, 45 Broadway, New York 6, New York, Proctor for Respondent.

[fol. 14] AFFIDAVIT OF LOUIS R. HAROLDS, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss.:

LOUIS R. HAROLDS, being duly sworn, deposes and says:

I am a member of the firm of William L. Standard, proctor for the libellant in this matter and am familiar with the facts and circumstances heretofore had herein.

This is a seaman's suit to recover personal injuries sustained on or about August 5th, 1949, while libellant was in the employ of the respondent, the United States of America, aboard the U.S.A.T. *Kingsport Victory*, a public vessel.

As a result of this accident, the libellant received treatment at the U. S. Marine Hospital, Stapleton, Staten Island, from on or about August 5th, 1949, to on or about November 24th, 1949. An abstract from the clinical record has been requested of the U. S. Marine Hospital, but this abstract has been refused up to the present time, in view of this pending litigation. Neither the libellant nor your deponent has an abstract of this hospitalization, and it is obviously necessary in connection with this suit.

Respondent has interposed a defense to the effect that libellant was paid compensation benefits under the U. S. Employees' Compensation Act (5 U.S.C. 751 et seq.) from August 1, 1949 through November 6, 1949, in the amount of $358.20, and that acceptance of this sum by the libellant constitutes an election on his part, barring the libellant's right to institute this suit.

[fol. 15] On the other hand, the libellant contends that the amount which was paid to him was hardly enough to constitute a sufficient amount for even his maintenance payments, and did not take into consideration his right to damages by reason of the manner in which the accident occurred. Libellant further contends that he was at no time made aware that he had any right to sue for damages under the Public Vessels Act, and that he did not understand that acceptance of the limited benefits which he was given, constituted a waiver of any other rights given him by law. Not knowing of his other rights, he could not "elect".

It is now well established that even in the stronger instances in which the government takes a release from a

seaman, in exchange for paying him some maintenance, the release would not constitute a bar to any other rights which the seaman may have, where the government is unable to show that he has been made aware of his physical condition, and the extent of his legal rights. (*Muruaga* v. *U. S.*, 172 F. (2d) 318 (C. A. 2d, 1949).)

In order to assist the libellant in establishing the foregoing, libellant requests to be permitted a discovery and inspection of the Workmen's Compensation file under which the government paid him compensation benefits.

Libellant also seeks an examination of witnesses' statements and accident reports, in order to determine who was responsible for the lumber which collapsed when he was injured, and the names and addresses of persons whose depositions may be taken with reference to various aspects of the case.

Wherefore deponent respectfully requests that this Honorable Court will grant the relief sought in the notice of motion herein.

Louis R. Harolds.

(Sworn to September 14, 1950.)

[fol. 16] In United States District Court

Memorandum re Libellant's Motion—December 6, 1950

In view of my decision filed today this is moot.

Edward A. Conger, U. S. D. J.

In United States District Court

[Title omitted]

Memorandum re Respondent's Motion

The motion is granted upon the authority of *Frader* v. *United States*, 1950 A. M. C. 784; *Johnson* v. *United States*, 89 F. Supp. 65; *Militano* v. *United States*, 156 F. (2d) 599; *Dahn* v. *Davis*, 258 U. S. 421.

It is plain that the amendments of 1949 were not intended to change the prior rights of seamen except to the extent of

further coverage under the Act. See 95 Cong. Rec. 13874-13875.

The argument that the libellant could not have "elected" because he was unaware of an alternative is without merit. That type of reasoning would absolve him from, for example, the statute of limitations. Filing a claim and receiving compensation in payment thereof constitutes an effective election under the Act. *Parr* v. *United States*, 172 F. (2d) 462.

Johnsen v. *American-Hawaiian S. S. Co.*, 98 F. (2d) 847 involves rescission of an election made in ignorance where [fol. 17] no one's rights are prejudiced by such rescission. The U. S. would certainly be prejudiced here.

Settle order.

Dated: December 4, 1950.

Edward A. Conger, United States District Judge.

UNITED STATES DISTRICT COURT

ORDER DISMISSING LIBEL—Filed December 18, 1950

Respondent, United States of America, having duly moved this Court by Notice of Motion for an order dismissing the libel on the ground that the libel fails to state a claim against respondent upon which relief can be granted or in the alternative, that the Court hear and determine in advance of trial the issues relating to the libellant's election to accept federal employees' compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel and for an order to give effect to such determination, and said motion having been duly brought on for a hearing before me at a Stated Term for the hearing of motions on the 17th day of October, 1950;

Now, upon reading and filing the said Notice of Motion, the memoranda of law submitted herein and after hearing Martin J. Norris in support of said motion, and Louis R. Harolds, Esq., in opposition thereto, due deliberation having [fol. 18] been had and the Court having rendered its opinion granting the said Motion, it is

Ordered that the libel be and hereby is dismissed.

Edward A. Conger, U.S.D.J.

Dated: New York, New York, December 15, 1950.

UNITED STATES DISTRICT COURT

COUNTER ORDER DISMISSING LIBEL AND DENYING MOTION FOR DISCOVERY AND INSPECTION—Filed December 18, 1950

The libellant having duly moved this Court for an order granting him a discovery and inspection,

And respondent, United States of America, having thereafter duly moved this Court for an order dismissing the libel on the ground that it fails to state a claim against respondent upon which relief can be granted, or in the alternative that the Court herein determine in advance of trial the issues relating to the libellant's election to accept Federal Employees' compensation benefits in lieu of any rights he might otherwise have had to obtain the relief sought in the libel,

And both said motions having been heard before me at a Stated Term for the hearing of motions on the 17th day of October, 1950;

Now, on reading and filing the affidavit of Louis R. Harolds, duly sworn to the 14th day of September, 1950, submitted on behalf of the libelant, and the affidavit of Martin [fol. 19] J. Norris, Esq., duly sworn to the 14th day of September, 1950, submitted on behalf of the respondent, and upon a copy of the pleadings and proceedings heretofore had herein,

And respondent, by its counsel, having made the following concessions in open Court:

1. The government's position was and is that a seaman employed on a public vessel of the United States who receives personal injuries, is given a sole and exclusive remedy by the Federal Employees' Compensation Act, and he has no other remedy. In view of the government's position as stated above, libellant was never advised that he had a right to elect as between compensation benefits on the one hand, and a suit for damages for personal injuries, on the other.

2. The government voluntarily sent to the libellant compensation payments, without any hearings, and without any final adjudication, on receiving his application.

and the Court having rendered its opinion after considering all the foregoing and the briefs of the parties, it be and hereby is

Ordered, the the libel be and hereby is dismissed; and it is further

Ordered, that the libelant's motion for a discovery and inspection be and hereby is denied on the ground that same has become moot in view of the Court's determination dismissing the libel herein.

Dated: New York, New York, December 15, 1950.

U. S. D. J.
Unsigned.

[fol. 20] UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that photostatic copies of the exhibits be made, and,

It is further stipulated and agreed by and between the proctors for the respective parties hereto that 3 copies of the abovementioned photostats be handed to the Court on the day of the argument.

Dated, New York, April 6th, 1951.

William L. Standard, Proctor for Libellant-Appellant.

Irving H. Saypol, Proctor for Respondent-Appellee.

Stipulation as to Record (omitted in printing).

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 275

Argued May 4, 1951. Decided July 30, 1951

Docket No. 22012

KONRAD G. JOHANSEN, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellee

Before L. Hand, Chase and Frank, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York dismissing the libel in a suit by a civil service employee for personal injuries while serving as a seaman on an army transport. Affirmed.

William L. Standard, Proctor for Libellant-Appellant; Louis R. Harolds, of Counsel.

Holmes Baldridge, Assistant Attorney General, Irving H. Saypol, United States Attorney, Leavenworth Colby, Special Assistant to the Attorney General, Martin J. Norris, Attorney, Department of Justice, for Respondent-Appellee.

[fol. 23] CHASE, Circuit Judge:

This appeal requires us to decide whether a civil service employee of the United States who is employed as a member of the crew of an army transport may sue the government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees Compensation Act, 5 U. S. C. § 751 *et seq.*

The appellant, Johansen, was a member of the crew of the U. S. A. T. "Kingsport Victory" as a civil service employee of the United States and not as a member of the armed forces. We understand that the parties agree that the transport was engaged in a military operation when he was, on August 5, 1949, hit by falling lumber and injured,

allegedly because of the negligence of the appellee or because of the unseaworthiness of the vessel. He was admitted to a marine hospital where he received treatment until, on October 24, 1949, he was discharged as cured.

The appellant was informed by his superiors, acting on behalf of the United States, that he, as a member of the civil service component of the crew of an army transport, had no right against the United States except to receive compensation benefits under the United States Employees Compensation Act. Believing this information to be correct and induced by it, he duly made application for such benefits and was awarded and paid in all $358.20. On November 7, 1949, he resumed his duties on full pay and his compensation payments were terminated. He then brought this suit, and appeals from a judgment which dismissed his libel on the ground that the acceptance of the compensation award was an election constituting a waiver of whatever right to sue he may have had.

[fol. 24] We need not decide whether the appellant is disabled from bringing this suit by an election to accept a compensation award; since, the government not having consented to be sued, that was his only remedy.

If *Johnson* v. *United States*, 4 Cir., 186 F. 2d 120, is to be read as holding that a civilian seaman on a patrol boat may sue the United States under the Public Vessels Act for injuries suffered in military operation, we are, with deference, constrained to disagree. This case falls within the category to which *Bradey* v. *United States*, 2 Cir., 151 F. 2d 742, cert. denied 326 U. S. 795, belongs. We there held, following *Dobson* v. *United States*, 2 Cir., 27 F. 2d 807, cert. denied 278 U. S. 653, that a naval enlistee serving as a member of the crew of a public vessel was not permitted by the Public Vessels Act to sue the government for personal injuries received in line of duty, and that such injuries were compensable only under the special provisions of law applicable to naval personnel. We took it to be a significant indication of the intent of Congress that it had, by the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50 U. S. C. Appendix § 1291, *et seq.*, given to officers and crew members employed by the War Shipping Administration a right to sue the United States for death or injury, but denied them the benefits of com-

pensation as United States employees. Similarly, in *Feres* v. *United States*, 2 Cir., 177 F. 2d 535, aff'd 340 U. S. 135, we held that an employee entitled to compensation as a member of the armed forces was precluded by that right from maintaining suit against the government under the Tort Claims Act for injuries received in line of duty.

Since the appellant would have been limited to suit if he had been employed aboard a merchant vessel of the United States, and to compensation if a member of the military service, allowing him but one means of recovery [fol. 25] will appropriately fit "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139.

Nor is it unreasonable to impute to Congress an intention to confer similar rights upon civilian and military members of the crew of a public vessel. The civilian component of the crew of an army transport is subject to military law just as the enlisted part of the crew. *Ex parte Falls*, D. N. J., 251 Fed. 415; *Ex parte Gerlach*, S. D. N. Y., 247 Fed. 616. Obedience by all members of the crew under the same sanctions may well be indispensable to the required maintenance of discipline in a military operation. Suits by civilian seamen, no less than by military personnel, would require judicial re-examination of the conduct of military affairs. We should not, without clear warrant in the statutory language, attribute to Congress an intent to permit civilian members of the crew of such a vessel to have an election denied enlisted members of the crew. The first have their rights under the Federal Employees Compensation Act, the second their rights as enlisted men to be compensated for service-connected injuries; the first, no more than the second, have been given the right to elect to sue the government rather than to accept such compensation.

Affirmed.

FRANK, Circuit Judge, dissenting:

I agree with the reasoning of *Johnson* v. *United States*, 186 F. (2d) 120 (C. A. 4). Accordingly, I think libellant had an election. The government, at oral argument, agreed

that libellant's superiors led him to believe that his sole remedy was under the Compensation Act. I think, therefore, that he never actually exercised his election.

[fol. 26] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of July, one thousand nine hundred and fifty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

KONRAD G. JOHANSEN, Libellant-Appellant,

v.

UNITED STATES, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 27] [Endorsed:] United States Court of Appeals, Second Circuit. Konrad G. Johansen v. United States. 275. Judgment. United States Court of Appeals, Second Circuit. Filed July 30, 1951. Alexander M. Bell, Clerk.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 401

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 414

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1951

CERTIORARI GRANTED JANUARY 2, 1952

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APPENDIX TO BRIEF FOR APPELLANTS

Relevant Docket Entries

Index No.	*Date*	*Docket Entries*
1.	Oct. 8, 1946.	Libel filed. Citation issued, returnable Oct. 18, 1946.
2.	Oct. 15, 1946.	Citation returned with affidavit of service attached thereto, filed.
3.	Oct. 30, 1946.	Exceptions of U.S. to libel filed.
4.	Oct. 30, 1946.	Exceptive allegations of U.S. filed.
5.	Oct. 30, 1946.	Defendant's motion to dismiss filed.
6.	June 24, 1947.	Order to place case on argument list filed.
7.	Oct. 17, 1947.	Libelant's answer to motion to dismiss filed.
8.	Oct. 17, 1947.	Libelant's answer to exceptive allegations filed.
9.	Oct. 17, 1947.	Libelant's answers to exceptions to libel filed.
10.	Nov. 21, 1947.	Opinion, McGranery, J., striking respondent's exceptions and denying motion to dismiss, etc. filed.
11.	Jan. 23, 1948.	Answer filed.
12.	Feb. 3, 1948.	Libelant's interrogatories filed.
13.	May 3, 1948.	Libelant's motion to compel answers and order of court requiring respondent to answer interrogatories within 21 days filed.
14.	June 21, 1948.	Libelant's motion for judgment for failure to answer interrogatories filed.
	Aug. 25, 1948.	Hearing sur motion for judgment.

15. Sept. 16, 1948. Defendant's answers to interrogatories filed.

16. Nov. 4, 1948. Libelant's motion for production of documents filed.

17. Nov. 4, 1948. Libelant's motion for judgment for failure to answer interrogatories as required by order of court filed.

18. Nov. 5, 1948. Order to place motion for production of documents on argument list filed.

19. Nov. 5, 1948. Order to place motion for judgment on argument list filed.

Dec. 13, 1948. Hearing sur libelant's motion for production of document and sur motion for judgment for failure to answer interrogatories C.A.V.

20. Dec. 6, 1949. Order of court denying motion for judgment for failure to answer interrogatories filed.

21. Dec. 12, 1949. Order to place case on argument list filed.

Jan. 3, 1950. Argued sur libelant's motion for production of documents.

22. Jan. 12, 1950. Affidavit of Patrick F. Cooney filed.

23. Jan. 12, 1950. Transcript of hearing Jan. 3, 1950.

24. Aug. 14, 1950. Affidavit of Wm. Alper in support of motion for production of documents filed.

25. Aug. 14, 1950. Opinion, Kirkpatrick J., granting libelant's motion for production of documents, except as to statements of the master, filed.

26. Oct. 9, 1950. Claim of privilege by the Secretary, Dept. of Army, filed.

27. Oct. 9, 1950. Affidavit by Ralph Sears, Col. T.C.

28. Oct. 9, 1950. Affidavit of Alexander Corey, Chief of Civilian Personnel, etc., U.S. Army, filed.

29. Oct. 17, 1950. Motion by respondent for rehearing upon libelant's motion for production of documents filed.

30. Oct. 24, 1950. Affidavit on behalf of libelant filed.

31. Oct. 25, 1950. Certified copies of documents in file of Federal Security Agency up to October 7, 1948 filed.

32. Oct. 25, 1950. Certified copies of documents in file of Federal Security Agency from October 7, 1948 to date filed.

33. October 27, 1950. Libelant's Answer to Motion for Rehearing filed.

Oct. 30, 1950. Hearing sur settlement of Decree and sur Motion for Rehearing (Order to be submitted).

34. Nov. 1, 1950. Order of Court directing respondent to produce certain notes of testimony filed.

35. Nov. 1, 1950. Order of Court denying motion for rehearing filed.

36. Nov. 3, 1950. Affidavit of libelant's counsel re deposition of Capt. Ernest O. Hambacher filed.

37. Dec. 11, 1950. Libelant's motion for an interlocutory decree in favor of libelant directing that case proceed to trial solely on question of damages filed.

38. Dec. 20, 1950. Defendant's notice of appeal and order of court allowing appeal filed.

39. Dec. 20, 1950. Copy of clerk's notice to U.S. Court of Appeals filed.

40. Jan. 4, 1951. Transcript of hearing of December 11, 1950 before Judge Kirkpatrick in chambers filed.

[Title of Court and Cause]

LIBEL IN PERSONAM

[Endorsed: Filed October 8, 1946]

The libel and complaint of Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., deceased, against the United States of America in a cause

of action for damages, civil and maritime, alleges, to wit:

1. The respondent, United States of America has by law consented to be sued herein.

2. Upon information and belief, libellant avers that at all times mentioned herein, the United States of America owned, operated and controlled the tug LT-221 as a merchant vessel in foreign commerce.

3. On or about the 15th day of October, 1944 and at all times mentioned herein, libellant's intestate, Robert Willie Dillehay, Jr., was in the employ of the respondent as a member of the crew of the tug LT-221, in the capacity of Second Assistant Engineer on a foreign voyage from New York, N. Y., to undisclosed ports anywhere in the world and return for a period of one year.

4. Upon information and belief, libellant avers that on or about the 15th day of October, 1944 at or about 10:00 A.M. o'clock, the tug LT-221 while in navigable waters at or near the port of Caglaria, Sardinia, suddenly suffered a violent explosion which was due to defective and inadequate boilers, internal mechanisms and other appliances and/or being negligently navigated into or causing contact with mines or other explosive devices, as a consequence of which the vessel sank, and as a result of all of which libellant's intestate met his death.

5. Disregarding its duties in the premises, respondent by its agents, servants and employees was careless and negligent in:

(a) failing to navigate the vessel in a safe and proper manner under the circumstances;

(b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;

(c) failing to maintain a proper and adequate lookout under the circumstances;

(d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;

(e) failing to provide, maintain and operate proper, safe and adequate engines, boilers, internal machinery and appurtenances thereto;

(f) causing the explosion as aforesaid;

(g) failing to provide, maintain and operate proper and adequate warning and signal devices;

(h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances;

(i) failing to provide, maintain and operate proper and adequate life rafts, lifeboats, life preservers and other safety and life saving equipment under the circumstances;

(j) failing to provide a safe and seaworthy vessel and appurtenances and to keep same in a safe and seaworthy condition.

6. As a further consequence of the negligence of the respondent, libellant avers that the deceased suffered severe and agonizing pain and shock and mental anguish before he died.

7. At the time deceased entered the respondent's employ, he was a strong, robust and able bodied man with the prospect of substantial advancement and earning capacity.

8. During the period of the deceased's employ by the respondent, he well and truly performed all of his duties in a capable and satisfactory manner.

9. The decedent left surviving him as his heirs-at-law and next-of-kin his wife, Eleanor B. Dillehay, and his daughter, Doris Ann Dillehay.

10. Libellant, Samuel Mandel, was appointed administrator of the estate of the deceased, Robert Willie

Dillehay, Jr. on the 1st day of October, 1946, on the order of the Register of Wills of Philadelphia County, State of Pennsylvania.

11. Libellant brings this action on behalf of Eleanor B. Dillehay and Doris Ann Dillehay under and by virtue of Section 33 of the Merchant Marine Act of 1920, 46 U.S.C.A. Section 688 and claims damages in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00) for this cause of action.

WHEREFORE, libellant prays that a citation in due form of law according to the rules and practice of this Honorable Court in a cause of admiralty and maritime jurisdiction may issue against the said respondent herein, citing them to appear and answer all and singular the matters aforesaid and that libellant may have judgment for the amount of One Hundred and Fifty Thousand Dollars ($150,000.00) with interest and costs and such other and further relief as the Court may deem just.

FREEDMAN, LANDY & LORRY,
By (S.)—ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Verification Omitted]

[Title of Court and Cause]

RESPONDENT'S EXCEPTIONS TO LIBEL

[Endorsed: Filed October 30, 1946]

The exceptions of the United States of America, respondent, in the above entitled cause, appearing specially herein, respectfully show:

1. That it appears from said libel and from the exceptive allegations annexed hereto and made a part

hereof that this court has no jurisdiction under the Suits in Admiralty Act for the reason that the U.S. Army Tug LT-221 was a public vessel of the United States and was not operated as a merchant vessel within the meaning of the Suits in Admiralty Act.

2. That it appears from said libel and from the exceptive allegations annexed hereto and made a part hereof that libelants intestate, Robert W. Dillehay, Jr., was a member of the crew of public vessel of the United States and was entitled to compensation under the U.S. Employees' Compensation Act and he is therefore precluded from suing the United States under the Public Vessels Act, Bradey v. U.S. 151 F. (2d) 742, certiorari denied 326 U.S. 795.

3. That it appears from said libel and from the exceptive allegations annexed hereto and made a part hereof that an award of employees' compensation has been made under the U.S. Employees' Compensation Act and accepted under that act by (Mrs.) Eleanor B. Dillehay and Doris Ann Dillehay, heirs of said Robert W. Dillehay, Jr. and that compensation having been accepted no suit is permitted against the United States under Dahn v. Davis 258 U.S. 421.

WHEREFORE respondent prays that said libel may be dismissed.

(S.) GERALD A. GLEESON,
U. S. Attorney,
Proctor for respondent,
Appearing Specially.

[Title of Court and Cause]

RESPONDENT'S EXCEPTIVE ALLEGATIONS

[Endorsed: Filed October 30, 1946]

The exceptive allegations of the United States, appearing specially herein, respectfully show:

I

That at all times hereinafter mentioned the said LT-221, was in truth the U.S. Army Tug LT-221 owned and operated by the U.S. Army as a public vessel of the United States.

II

That libelant's intestate, Robert W. Dillehay, Jr., was a direct employee of the United States War Department and was a Civil Service employee of the United States Government.

III

That libelant's intestate, Robert W. Dillehay, Jr., was a member of the crew of the U.S. Army Tug LT-221 when that vessel struck a minefield off the coast of Sardinia on October 15, 1944 and exploded as a result of the explosion of said mines.

IV

That Robert W. Dillehay, Jr., as a civilian employee of the U.S. Army, was covered by and entitled to the benefits of the U.S. Employees' Compensation Act.

V

That on March 5, 1946, the U.S. Employees' Compensation Commission made an award of compensation on the claim (for the death of Robert W. Dillehay, Jr.)

filed by (Mrs.) Eleanor B. Dillehay on behalf of Doris Ann Dillehay.

VI

That on February 12, 1946 said Eleanor B. Dillehay in accepting employees' compensation on behalf of Doris Ann Dillehay, did release the U.S. and all its departments of any claim arising out of the death of her husband, Robert Willie Dillehay, Jr.

VII

That in December, 1945, said Eleanor B. Dillehay received $5500 in war risk benefits from war risk insurance carried by the War Department with the War Shipping Administration.

VIII

That by reason of the foregoing this court has not jurisdiction of the cause of action alleged under the Suits in Admiralty Act (46 U.S.C. 741-752); that although the U.S. Army tug LT-221 was a public vessel of the United States, libelant's intestate as a War Department employee covered by U.S. employees' compensation was precluded from suit under the Public Vessels Act (46 U.S.C. 781-790) for injuries suffered as one of the crew of a public vessel; and that a compensation award having been made by the U.S. Employees' Compensation Commission and accepted by the heirs of libelant's intestate, no suit against the United States is permitted and the compensation is libelant's exclusive remedy.

(S.) GERALD A. GLEESON,
U. S. Attorney.

[Title of Court and Cause]

RESPONDENT'S MOTION TO DISMISS

[Endorsed: Filed October 30, 1946]

The United States of America, appearing specially herein, hereby moves the Court to dismiss the libel in the above case, upon the annexed affidavit and the statements contained in the face of the libel, for the following reasons:

1. The LT-221 alleged by libelant to be a merchant vessel of the United States was at all times material hereto, the United States Army Tug LT-221 owned and operated by the United States Army as a public vessel of the United States; and that libelant's proctors well know that this is the case as shown by the correspondence annexed to the affidavit herein.

2. That Robert W. Dillehay, Jr. was a direct employee of the War Department, a Civil Service employee of the United States, entitled to United States Employees' Compensation and that he is precluded from suing the United States under the Public Vessels Act, *Bradey* v. *United States,* 151 F. (2d) 742.

3. That the United States Employees' Compensation Commission has made an award of compensation in the above case, which has been accepted by Mrs. Eleanor B. Dillehay and by Doris Ann Dillehay, heirs of Robert W. Dillehay, Jr., and that the award of United States Employees' Compensation precludes any suit against the United States. *Dahn* v. *Davis,* 258 U. S. 421.

(S.) GERALD A. GLEESON,
United States Attorney.

[Title of Court and Cause]

AFFIDAVIT

R. L. Hiller, being duly sworn, deposes and says:

That he is a member of the bar of this Honorable Court and is the Assistant United States Attorney in charge of the above case and upon information and belief states as follows:

1. That the LT-221 was a U. S. Army tug owned and operated by the U. S. War Department and was sunk in a mine field off the coast of Sardinia on October 15, 1944. That as shown by the letter from Messrs. Freedman, Landy & Lorry to the Army Transport Service, dated September 11, 1946, and annexed hereto as Exhibit A:

> "The above decedent entered the Merchant Marine in 1943 and was trained at the Marine Officers' Training School at St. Petersburg, Florida. Upon graduation from that school, he was sent to New Orleans, where he was assigned to United States Army Tug—LT221, as a civilian employee of the United States Army. He was a member of the crew of that vessel for almost one year, during which time he was promoted to Second Assistant Engineer. While in the service of this vessel, he died when the vessel exploded and sank on October 15th, 1944.
>
> "We have been informed that the vessel was navigated into a fixed mine field as it was approaching the harbor of Caglaria, Sardinia, struck a mine, and sank within two minutes with heavy loss of life."

2. That as a civilian employee of the U. S. Government Robert W. Dillehay, Jr. was covered by the U. S.

Employees' Compensation Act and as is shown by letter from the U. S. Employees' Compensation Commission to Mrs. Eleanor B. Dillehay dated March 5, 1946 (annexed hereto as Exhibit B) and her release dated February 12, 1946 (Exhibit C) a compensation award has been made and accepted by Mrs. Dillehay on behalf of a minor child, Doris Ann Dillehay.

3. That as is shown by letter dated September 24, 1946 (annexed hereto as Exhibit D) from the Chief of the Water Transport Service, U. S. Army, to Messrs. Freedman, Landy & Lorry they were advised that Mrs. Dillehay had been paid $5500 in war risk benefits and that her daughter was being paid compensation at the rate of $17.50 a month; that Robert W. Dillehay, Jr. was a civilian employee of the Government and was entitled to employees' compensation.

The sources of my information and the grounds for my belief are official documents and records obtained from the War Department.

(S.) R. L. HILLER.

Sworn and subscribed before me this 30th day of Oct., 1946.

(S.) ROBERT T. PRESS,
Deputy Clerk,
U. S. District Court Eastern
District of Pennsylvania.

[Exhibit A to Affidavit]

FREEDMAN, LANDY & LORRY

Counsellors at Law and Proctors in Admiralty
906 Jefferson Building—1015 Chestnut Street
Philadelphia 7, Pa.

September 11th, 1946.

Army Transport Service
United States Army
Washington, D. C.

Re: Robert W. Dillehay, Jr., Deceased

Gentlemen:

We represent the Estate of Robert W. Dillehay, Jr., deceased, a member of the crew of the United States Army Tug—LT221, who perished when the vessel sank outside the port of Caglaria, Sardinia, on October 15th, 1944.

The above decedent entered the Merchant Marine in 1943 and was trained at the Marine Officers' Training School at St. Petersburg, Florida. Upon graduation from that school, he was sent to New Orleans, where he was assigned to United States Army Tug—LT221, as a civilian employee of the United States Army. He was a member of the crew of that vessel for almost one year, during which time he was promoted to Second Assistant Engineer. While in the service of this vessel, he died when the vessel exploded and sank on October 15th, 1944.

We have been informed that the vessel was navigated into a fixed mine field as it was approaching the harbor of Caglaria, Sardinia, struck a mine, and sank within two minutes with heavy loss of life.

Would you please be good enough to inform us whether a hearing was held and whether a determination was made of the cause of this accident. We would

appreciate it if you would forward to us a copy of any report or record that you might have with regard to this incident. If information can be obtained by us from another department of the Government, would you please be good enough to inform us where this information can be obtained.

We would particularly appreciate a copy of any testimony of any witnesses taken in connection with the investigations.

The purpose of this request is to determine whether Mrs. Dillehay, the widow, and her child have any claim by reason of the death of the decedent. In this connection, we direct your attention to the fact that the statute under which the claim may be prosecuted, contains a two-year limitation. The action here having occurred on October 15th, 1944, will therefore be barred unless action is taken by October 15th of this year. Mrs. Dillehay was not advised of the death until comparatively recently and, consequently, there has been limited time for investigation. Under the circumstances, will you kindly give this matter your immediate attention so that the claim on behalf of the widow and child will not be barred by the statute of limitations.

Thanking you for your cooperation, we are

Very truly yours,

FREEDMAN, LANDY & LORRY
By (S.) WILLIAM W. ALPER

WMA:JV
Air Mail

[Exhibit B to Affidavit]

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York 17, N. Y.

March 5, 1946

Mrs. Eleanor B. Dillehay
967 Maxey Street
Memphis 11, Tenn.

Dear Madam:

The claim submitted by you on behalf of Doris Ann Dillehay, minor daughter, for compensation on account of the loss on October 15, 1944, of her father, Robert Willie Dillehay, Jr., a former employee of the Army Transport Service, has been approved and an award of $17.50 per month has been made on her account, payable to you as natural guardian, until she dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she is able to support herself. No greater amount can be awarded under the law.

A check in the amount of $288.75 will go forward to you in a few days, representing compensation from October 16, 1944 to February 28, 1946, inclusive. In the future your semi-monthly checks will be for $8.75 each.

Claims for further compensation should be prepared by you on the enclosed forms CA 13 on the first of the following months: *January, April, July and October,* in accordance with the instructions on the back of the form, and forwarded to the Commission.

Checks will be mailed to you on the first and sixteenth of each month to cover the half month just past. If the status of Doris Ann Dillehay should change and a

check reaches you in payment of compensation, you should return it immediately to this office with an explanation. If claims are not forwarded by you on the foregoing dates, compensation will be suspended until the Commission has ascertained whether you are entitled to further payments. All inquiries in regard to claims or checks should be addressed to this office, and reference made to File No. X-93871.

This letter should be retained by you as evidence of the award and the instructions carefully complied with to insure prompt payments.

Very truly yours,

STEPHEN O'HEARNE,
Acting Chief of Section.

WJH:tr

[Exhibit C to Affidavit]

RECEIVED FROM the United States of America an award of Seventeen and 50/100 Dollars ($17.50) per month on account of my child, Doris Ann Dillehay, and the child of Robert Willie Dillehay, Jr., commencing October 16, 1944, under Section 10 of Public Law 267, 64th Congress, approved September 7, 1916, as amended, to continue until the child dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she becomes capable of self-support, in consideration for which I hereby release the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are or were the owners, agents, charterers, masters, officers and crews of said vessels, of each and every right or claim which I now have or may hereafter

have because of any matter or thing which happened before the signing of this paper; and particularly, but not in limitation of any of the foregoing general terms, of and from all claims arising out of or in any way connected with the death of my late husband, Robert Willie Dillehay, Jr., while he was serving as a member of the crew of the USAT LT-221.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 12 day of February, 1946.

(S.) ELEANOR B. DILLEHAY.

STATE OF TENNESSEE,
County of Shelby, City of Memphis:

On the 12th day of February, 1946, personally appeared the above named Eleanor B. Dillehay, known to me to be the person whose signature appears next above, and acknowledged the free and voluntary execution of the above release with full appreciation of its effect.

(S.) EDITH JACKSON,
Notary Public.

My Commission Expires Oct. 17, 1948.

NOTARY'S SEAL

[Exhibit D to Affidavit]

TCWTS MO—201 Dillehay, Robert W. Jr.

24 September 1946

Freedman, Landy & Lorry
906 Jefferson Building
1015 Chestnut Street
Philadelphia 7, Pennsylvania

Gentlemen:

This acknowledges receipt of your letters of 11 September 1946 addressed to this office and the Comman-

dant, United States Coast Guard, regarding the death of Robert W. Dillehay, Jr. on 15 October 1944 when the U.S. LT-221 sank at Cagliari, Sardinia.

Information available to this office shows that Mrs. Dillehay, 773 East Trigg Street, Memphis, Tennessee, was informed on 6 November 1944 that her husband, Robert W. Dillehay, Jr., was reported missing in action on 15 October 1944 in the North African Theater, and she was notified on 28 February 1945 that he was killed on 15 October 1944 at Sardinia.

The records of this office show that Mrs. Dillehay received war risk benefits amounting to $5500 in December 1945 and that her daughter is being paid compensation at the rate of $17.50 per month. Furthermore, there is on file copy of release signed by Mrs. Dillehay.

The position of a civilian seaman hired by the War Department is a civilian employee of the Government, and is not within the scope of Public Law 17, which is limited to civilian seamen who are hired through the U. S. Maritime Commission. In that situation, rights, whatever they are, must be asserted through the Federal Security Agency, Bureau of Employees' Compensation, 285 Madison Avenue, New York 17, New York.

Sincerely,

WILBUR S. ELLIOTT,
Colonel, TC,
Chief, Water Transport Service.

FFF LGV

VIG—4723
eb

[Title of Court and Cause]

LIBELANT'S ANSWER TO RESPONDENT'S MOTION TO DISMISS

[Endorsed: Filed October 17, 1947]

(1) Libellant does not have sufficient information to determine whether the LT-221 was a merchant vessel or a public vessel of the United States and therefore, denies the allegation that the vessel is a public vessel and demands due proof thereof, if material.

(2) It is admitted that Robert Willie Dillehay, Jr., was an employee of the United States and a member of the crew of the LT-221; it is denied that the libellant is precluded from suing the United States under the Public Vessels Act or under the Suits in Admiralty Act and it is alleged further, that the case of *Bradey* v. *United States*, 151 F(2d) 742, has no application to the facts in the instant case.

(3) It is admitted that an award of compensation has been made to Doris Ann Dillehay, daughter of the decedent, but it is denied that any award has been made or accepted by or on behalf of Mrs. Eleanor B. Dillehay, widow of the decedent; it is denied further, that the award of the United States to the daughter, Doris Ann Dillehay, precludes the suit against the United States by or on behalf of Eleanor B. Dillehay.

FREEDMAN, LANDY AND LORRY,
By
ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Title of Court and Cause]

LIBELANT'S ANSWER TO EXCEPTIVE ALLEGATIONS

[Endorsed: Filed October 17, 1947]

Libellant's answers to the exceptive allegations of the United States, respectfully represent as follows:

(1) It is denied that the said tug was operated as a public vessel but on the contrary, was operated as a merchant vessel of the United States.

(2) Libellant does not have sufficient information to be able to answer the second allegation and therefore denies same and demands due proof thereof, if material; it is admitted, however, that the libellant's intestate was a member of the crew of the Tug LT-221 which was owned and operated by the United States.

(3) Admitted for the purpose of this argument.

(4) Upon information and belief libellant admits that the decedent was a civilian employee of the United States; it is denied however, that he was exclusively covered by the United States Employees Compensation Act.

(5) It is admitted that an award of compensation was made by the United States Employees Compensation Commission to Doris Ann Dillehay, the minor child of the decedent. It is further averred that Eleanor B. Dillehay, widow of the decedent, would be independently entitled to the sum of $61.00 in behalf of herself under the terms of the United States Employees Compensation Act; it is further averred that said sum, however, could not be recoverable before 1952; the said Eleanor B. Dillehay has, therefore, elected to take the benefits under the general law to the exclusion of any benefits which may be accorded to her under the terms of the United States Employees Compensation Act.

(6) It is denied that Mrs. Eleanor B. Dillehay in

accepting compensation on behalf of Doris Ann Dillehay, as the natural guardian of the said minor, released the United States for all claims arising out of the death of her husband insofar as her own personal claims were concerned. On the contrary, any release entered into between the said parties, was intended to cover only the payments made on behalf of the minor child whose claim was separate and independent from that of the widow, Eleanor B. Dillehay. It is further averred that the Employees Compensation Commission by express communication, advised Mrs. Eleanor B. Dillehay that she should not obtain the services of an attorney relative to the negotiations with the Commission and in the event she needed any advice, she was advised to seek such advice from the Commission and not that of an attorney.

(7) It is admitted that Eleanor B. Dillehay received the proceeds of a policy of war risk insurance, and, it is averred further, that she received the said proceeds as the designated beneficiary under the terms of the said policy; It is averred further, that the said proceeds of war risk insurance were not paid under the terms of the Employees Compensation Act or in connection with any claim for damages and that the payment of the said proceeds has no bearing upon the issues in the instant case.

(8) It is denied that this Court does not have jurisdiction under the Suits in Admiralty Act and it is denied that the libellant's intestate was covered by the United States Employees Compensation Act and it is denied that he was precluded from suit under the Public Vessels Act; it is denied further, that a compensation award has been made by the United States to Eleanor B. Dillehay and it is averred on the contrary, that no monies whatsoever have been received

under the Compensation Act on behalf of Eleanor B. Dillehay.

FREEDMAN, LANDY & LORRY,
By ABRAHAM E. FREEDMAN,
Proctors for the Libellant.

[Title of Court and Cause]

LIBELANT'S ANSWER TO RESPONDENT'S EXCEPTIONS AND EXCEPTIVE ALLEGATIONS TO LIBEL

[Endorsed: Filed October 17, 1947]

The answers of the libellant to the exceptions of the respondent in the above entitled matter, respectfully represent as follows:

(1) It is denied that this Court has no jurisdiction under the Suits in Admiralty Act and it is denied further, that the United States Army Tug LT-221 was a public vessel; on the contrary, it is averred that the said vessel was operated as a merchant vessel and it is averred further, that this Court has jurisdiction either under the Suits in Admiralty Act, or under the Public Vessels Act.

(2) It is admitted that the libellant's intestate, Robert Willie Dillehay, Jr., was a member of the crew of the LT-221, but it is denied that the libellant is precluded from suing the United States under the Public Vessels Act, and it is denied further, that the libellant's intestate was precluded from suing the United States under the Public Vessels Act; it is denied further, that the case of *Bradey v. United States,* 151 F(2d) 742, has any application to the instant case.

(3) It is denied that any award was made to or accepted by Eleanor B. Dillehay under the United States Employees Compensation Act; it is admitted that an

award of compensation under the said Act was made and accepted on behalf of Doris Ann Dillehay, daughter of the decedent; it is denied further, that Eleanor B. Dillehay, widow of the decedent, is precluded from suit against the United States for damages resulting from the death of her husband.

FREEMAN, LANDY & LORRY,
By ABRAHAM E. FREEDMAN,
Proctors for Libellant.

[Title of Court and Cause]

OPINION OF DISTRICT COURT

Sur Respondent's Motion to Dismiss

November 21, 1947.

McGRANERY, J.:

Only one of these cases arises on a motion to dismiss. However, since they involve similar issues, they were argued, and will be considered, together. Libellant Harry Schmidt was a marine engineer employed by the Government as a member of the crew of the "Y-95," a vessel operated by the United States. Schmidt became ill and afflicted with tuberculosis while in the service of the vessel and was thereafter removed from her for hospitalization. This suit was instituted for the recovery of maintenance and cure and damages.

Samuel Mandel is suing as administrator of the estate of Robert Willie Dillehay, Jr. Decedent was a member of the crew of the Tug LT-221, and an employee of the United States, when the vessel hit a mine field off Sardinia, causing an explosion and his death. Decedent left a wife and minor child surviving him. His widow received the benefits of a war risk insurance policy and the United States Employees Compensation

Commission made an award of $17.50 per month, later increased, on a claim submitted by Mrs. Dillehay on behalf of her daughter. Mrs. Dillehay later executed a release to the United States, the effect of which is disputed. She now sues for damages.

The Government in both cases has filed exceptions to the libel, and in the Mandel case has moved to dismiss. The chief legal issue in both actions is whether a member of a crew of a public vessel who is in the employ of the United States can maintain an action against the United States under the Public Vessels Act. There is a factual question as to whether the vessels here involved are public or merchant vessels, and were the disposition of these cases to turn upon a determination of that issue, I would hesitate to make a decision on the record as it now stands. However, that fact I feel, is not controlling. Libellant in both cases claims that the Public Vessels Act was intended to subject the Government to the same sort of liability growing out of the activities of its public vessels as the Suits in Admiralty Act did concerning its merchant vessels. Therefore, since a merchant seaman employed by the Government upon a merchant vessel can sue the United States, under the latter act, it is argued that the fact that the vessels in these cases may be public vessels will not change the result.

The question at issue has not been raised frequently nor definitely decided. The Supreme Court only recently has construed the Public Vessels Act twice. In Canadian Aviator Ltd. v. United States, 324 U.S. 215, it concluded that the Act allowed suits against the Government not only for damages caused by collisions, but also for damages resulting from the negligence of its employees on a public vessel. In American Stevedores v. Porello, 330 U.S. 446 the court again rejected a narrow interpretation of the Act in holding that it allowed

suits for personal injuries as well as for property damage. However, in neither case was the injured party a Government employee or a member of the crew of the Government vessel. Other authority is similarly scanty and distinguishable. Thus, it was held that a member of a United States Navy destroyer, or of a submarine could not sue the Government under the Act. Cf. Bradey v. United States, 151 F. (2d) 742, cert. den. 326 U.S. 795; Dobson v. United States, 27 F. (2d) 807. However, the injured persons in these cases were naval personnel, not merchant seamen. In the Bradey case, the court pointed out that the existence of compensation under the United States Employees Compensation Act or Navy pension systems is ground for construing the Public Vessels Act to exclude another remedy for members of the crew of a public vessel. See Bradey v. United States, supra, at 743. However, there has been disagreement with the reasoning upon which this holding was based. See United States v. Marine, 155 F. (2d) 456, 459, where a customs inspector, covered by the Employees Compensation Act, was nevertheless allowed to sue the Government.

The Public Vessels Act provides that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States. . . ." 46 U.S.C.A. 781. The dissent in the *Porello* case has not unfairly described the majority construction of this statutory phrase as covering "personal injuries due to failure to provide proper working conditions for a longshoreman". This is analogous to the constructions apparently called for by libellant in the Mandel case and by the negligence counts in the Schmidt case. Whether or not this statutory language can properly be said to embrace a suit for maintenance and cure as well is a closer question. However, it is my belief that libellants' contentions are

substantially correct, that the Public Vessels Act and the Suits in Admiralty Act must be read *in pari materia*, and that the former was an attempt to equate the Government's liability in the operations of its merchant and public vessels. See Canadian Aviator, Ltd. v. United States, 142 F. (2d) 709, 715 (dissent, Biggs, J.); State of Maine v. United States, 45 F. Supp. 35, 37. Although, for reasons peculiar to their status, members of the armed forces should be excluded from the waiver of sovereign immunity, a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government. I feel that these suits would lie under the Suits in Admiralty Act. Cf. Dezerene v. United States, 59 F. Supp. 797; Stewart v. United States, 25 F. (2d) 869. Accordingly, therefore, the fact that these may be public vessels will not affect the jurisdiction of the court. Cf. Krey v. United States, 123 F. (2d) 1008.

The Government also claims that the remedy available under the United States Employees Compensation Act bars the libel in these two cases. However, I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here. United States v. Marine, supra. There is no question that libellant Schmidt has not received any such compensation. In the Mandel case, the effect of the release by Mrs. Dillehay for the award made to her daughter cannot be determined on the record as it now stands.

Therefore, respondent's exceptions in the Schmidt case will be stricken. The motion to dismiss in the Mandel case is denied with decision reserved on the issue of the effect of the release until further evidence is produced.

[Title of Court and Cause]

RESPONDENT'S ANSWER

[Endorsed: Filed January 23, 1948]

To the Honorable, the Judges of Said Court:

Now comes the respondent by its attorney Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and makes the following Answer to the libel in personam heretofore filed by the libellant:

1. It is denied that the United States of America, respondent herein, has by law consented to be sued herein and denies the jurisdiction of Your Honorable Court to hear and determine the matter.

2. It is admitted that at all times mentioned in the libel, the United States of America owned, operated, and controlled the Tug LT-221, but it is denied that said vessel was a merchant vessel as alleged in the libel. It is averred on the contrary that at all times mentioned in the libel, the Tug LT-221 was owned by the United States of America and was operated and controlled by the United States Army in its war operations as a public vessel of the United States.

3. Admitted. It is averred, however, that in his employment as a member of the crew of the Tug LT-221, Robert Willie Dillehay, Jr. was in fact a civilian employee of the War Department, and as such was a Civil Service employee of the United States of America.

4. It is admitted that on or about October 15, 1944, the United States Army Tug LT-221 sank while in navigable waters in the vicinity of Cagliari, Sardinia, and that Robert Willie Dillehay, Jr. lost his life. The remaining averments of Paragraph 4 of the libel are denied.

5. The averments of Paragraph 5 of the libel are de-

nied, as are also the averments in subdivisions (a) to (j) inclusive.

6. The averments of Paragraph 6 of the libel are denied.

7. The averments of Paragraph 7 of the libel are denied.

8. The averments of Paragraph 8 of the libel are admitted, but it is denied that such averments are material.

9. The averments of Paragraph 9 of the libel are admitted.

10. The averments of Paragraph 10 of the libel are admitted.

11. The averments of Paragraph 11 of the libel are denied. The respondent denies the right of the libellant to bring and maintain this or any other suit against the United States for or on behalf of Eleanor B. Dillehay and Doris Ann Dillehay. The respondent further denies that the libellant is entitled to recover the amount claimed herein, or any other amount by reason of the death of Robert Willie Dillehay, Jr.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, THE RESPONDENT AVERS:

12. That by the Act of September 7, 1916, as amended, known as the United States Employees Compensation Act (5 U.S.C. 751 et seq.), Congress has provided for the payment of compensation for disability of employees of the United States resulting from personal injury sustained in the performance of duty and has provided for compensation benefits to certain classes of dependents of such employee in cases of death occurring in the performance of duty.

13. That Robert Willie Dillehay, Jr., libellant's intestate, as a member of the crew of the United States

Army Tug LT-221 was an employee of the United States through its War Department and was engaged in the performance of his duty as such employee at the time he met his death, within the meaning of the Act of Congress mentioned above.

14. That libellant's full and complete remedy is by way of compensation under the provisions of the United States Employees Compensation Act, as aforesaid, and that Congress having thereby provided relief for persons in the position of libellant, libellant is thereby barred from any other remedy or recovery against the United States in a suit or proceeding in admiralty or otherwise, and has no cause of action against the United States for the occurrence alleged in the libel, and no legal right or standing to maintain this libel or proceeding. The remedy under the United States Employees Compensation Act is exclusive.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, RESPONDENT AVERS:

15. That upon the application and claim of decedent's widow, Eleanor B. Dillehay, the United States Employees Compensation Commission made an award of $17.50 per month for Doris Ann Dillehay, decedent's minor daughter. On January 31, 1947 the United States Employees Compensation Commission increased the award to Doris Ann Dillehay, decedent's minor daughter, to $43.75 a month for the reason that the decedent's widow Eleanor B. Dillehay had remarried, and the minor thereby became entitled to 25% of the statutory maximum wage per month rather than 10% of such maximum wage upon which the award was originally based. It is averred that the making and acceptance of such award constituted an election, and that libellant is, therefore, barred from

bringing and maintaining any suit against the United States arising out of the death of Robert Willie Dillehay, Jr. on behalf of Doris Ann Dillehay.

FURTHER ANSWERING THE LIBEL, AND AS A SEPARATE AND COMPLETE DEFENSE THERETO, RESPONDENT AVERS:

16. That on February 12, 1946, in consideration of the award made by the United States Employees Compensation Commission to Doris Ann Dillehay, the decedent's widow, Eleanor B. Dillehay, executed a release to the United States of America releasing "the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are or were the owners, agents, charterers, masters, officers and crews of said vessels, of each and every right or claim which I now have or may hereafter have because of any matter or thing which happened before the signing of this paper; * * * of and from all claims arising out of or in any way connected with the death of my late husband, Robert Willie Dillehay, Jr., while he was serving as a member of the crew of the USAT LT-221." By reason of such release the libellant is without right to bring and maintain an action against the United States or any of its agencies or instrumentalities on behalf of Eleanor B. Dillehay, for any claims arising out of or in any way connected with the death of Robert Willie Dillehay, Jr.

WHEREFORE, Respondent denies that libellant is entitled to claim the sum of $150,000.00 as alleged in the libel, or for any other amount whatsoever; and prays Your Honorable Court that the libel here be dismissed with costs assessed against the libellant, and for such

other and further relief as the justice of the cause may require.

GERALD A. GLEESON,
United States Attorney,
Attorney for Respondent.

[Verification Omitted]

[Title of Court and Cause]

LIBELANT'S INTERROGATORIES TO BE ANSWERED BY THE RESPONDENT

[Endorsed: Filed February 3, 1948]

1. State all the facts relating to the alleged accident and/or injuries and death of plaintiff's decedent and his claim for damages as to which you and your underwriters have obtained information through witnesses, agents or other representatives.

2. Identify all reports, communications, memoranda (oral or written) by date; the nature thereof; the name, address and job classification of the person making or rendering same and of the person or agency (governmental or otherwise) to whom directed. Identify all witnesses by name, address, rating or job classification together with the name and address of their employer.

3 Attach hereto true and correct copies of all written statements (signed or unsigned) from any and all persons, including the libellant or the decedent, who purport to be witnesses or have any knowledge regarding the said accident and/or injuries or death or any matter connected therewith or related thereto, including statements taken by the Federal Bureau of Investigation or any other governmental agency. Attach hereto true copies of memoranda of any oral state-

ments which the United States of America or its representatives have obtained or received from any such person.

4. Attach hereto true and correct copies of all log book entries covering the period of the alleged explosion and marine disaster on the pier prior to and following that time (rough, smooth, official, engine room, bridge, medical, etc.), injury and death reports, and any other reports and communications relating to the said explosion, marine disaster and/or death.

5. State whether the libellant or the decedent made any statement or report to you or your representatives orally or in writing, and if so, attach a true copy of the same or memorandum thereof.

6. State whether the libellant's decedent was submitted to any physical or medical examination before or during the course of the voyage in question, and, if so, set forth in detail the results of such examination and attach true copies of all reports from any sources in connection therewith.

7. State the present location and the name, address and job classification of the person having custody of the shipping articles and payroll records covering the voyage in question and of the statements, log books, reports, communications and memoranda referred to hereinabove, identifying the same with particularity, and state the name and address of his employer.

FREEDMAN, LANDY AND LORRY
By WILLIAM M. ALPER,
Proctors for Libellant.

[Title of Court and Cause]

RESPONDENT'S ANSWERS TO INTERROGATORIES

[Endorsed: Filed September 16, 1948]

The answers of the United States of America, respondent herein, to the interrogatories propounded by the libelant in this cause are as follows:

1. The facts relating to the alleged accident, injuries and death of libelant's decedent and his claim for damages are as follows:

Libelant's decedent, Robert Willie Dillehay, Jr., appears to have drowned on October 15, 1944, when the U.S. Army Tug LT-221 struck a mine at 0950 hours in the Gulf of Cagliari at a point in the vicinity of 38° 18½′ N. by 9° 15′ E. and sank in less than two minutes. She was a total loss and 13 members of her total company of 27 were missing and presumably drowned, including libelant's decedent. Between 0900 and 1000 hours the sea in the Gulf of Cagliari was calm, visibility was good, and the wind was from the northwest, fresh, with a velocity of force 3. The LT-221 had departed Marseilles, France, at 0800 hours October 13, 1944. About 1800 hours on October 14, 1944, the LT-221 arrived off Cape Spartivento, Sardinia. She stayed off the Gulf of Cagliari until the morning of October 15, 1944, traveling during the night at a reduced speed on a due east course until she reached a point south of the eastern extremity of the Gulf. She approached the entrance of the eastern swept channel into the Gulf of Cagliari at about 0730 hours October 15, 1944. Her Master, Ernest A. Hambacher, was familiar with the various landmarks as a result of having negotiated the swept channel in question on at least three previous occasions, to-wit, August 15, 1944, August 16, 1944, and September 18, 1944. He made a fix of his position off

Cape Finocchio at 0900 hours as identified by the visible wreckage there and determined that at her then speed of 11 knots she would arrive at the buoy where she should turn left at about 0930 hours. About 0930 the bouy was sighted and the LT-221 swung left to 257° true. The navigation of the LT-221 was confirmed by the fact that she had been following a Liberty ship which had made a similar left turn and taken a course to the west. When the LT-221 was at the buoy the Liberty was opposite Cape Santa Elia, about to make a right turn into the Port of Cagliari. The LT-221 continued on her course toward the point where the Liberty was making its turn around Cape Santa Elia for about 15 or 20 minutes, when there was a terrific explosion and the tug sank.

Libelant's decedent, Robert Willie Dillehay, Jr., age 22, was a civil service employee of the War Department, Transportation Corps, New Orleans Port of Embarkation, serving as Third Assistant Engineer aboard the LT-221. At the time of his death his pay was $2,200 per annum plus subsistence and quarters valued at $540, plus a bonus of $183.33, or a monthly wage of $411.66 for purposes of computing compensation. His life was also insured by the United States under the Second Seaman's form of War Risk Insurance Policy in the amount of $5,500, under which Eleanor B. Dillehay, widow of the decedent, was designated beneficiary, and payment of the $5,500 benefit was made by the United States in due course.

Claim for compensation on account of decedent's death was filed with the Bureau of Employees' Compensation, Federal Security Agency, on Form CA-5, by Eleanor B. Dillehay, born November 11, 1921, as the widow of the decedent on her own behalf and on behalf of Doris Ann Dillehay, born February 13, 1943, the minor daughter of the decedent. Claim was received

on May 3, 1945, within one year of the death. On April 3, 1946, the Bureau of Employees' Compensation determined that Eleanor B.. Dillehay would not be eligible to receive United States Employees' Compensation on her own account by reason of the provisions of Article 25 of the Second Seaman's War Risk Policy, providing that recoveries from the United States should not be cumulative, until the amount otherwise payable as such compensation should exceed the $5,500 proceeds of the war risk insurance benefits which she had received; that Doris Ann Dillehay had received no benefit of the war risk insurance and that in consideration of the award made to Eleanor B. Dillehay as the natural guardian on behalf of the minor daughter of herself and the decedent, she execute before a notary public and submit a release of all demands against the United States of America and all its departments and agents, which is now on file. The Bureau accordingly awarded compensation for the death of the said Robert Willie Dillehay, Jr., to be paid to the widow on behalf of the minor daughter of the decedent, subject to modification in accordance with the provisions of Section 10 of the Act as follows: "10% of the maximum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or if over eighteen and incapable of self-support on account of some mental or physical disability until becoming capable of self-support." Thereafter, on February 2, 1947, the Bureau of Employees' Compensation modified its award pursuant to a determination that Eleanor B. Dillehay had remarried on February 14, 1946, that the compensation otherwise payable to Eleanor B. Dillehay on her own account from October 16, 1944, to February 13, 1946, inclusive, was less than the war risk insurance which she received from the War Shipping Administration; that she would therefore at no time

be eligible to receive any compensation on her own account as a widow. The Bureau accordingly modified the previous award and awarded compensation commencing February 14, 1946, to be paid to Eleanor B. McNamee, formerly Eleanor B. Dillehay, as the natural guardian of Doris Ann Dillehay, decedent's daughter, subject to modification in accordance with Section 10 of the Act as follows: "25% of the maximum wage, $175.00, or $43.75 per month until she dies, marries, reaches the age of eighteen, or if over eighteen and incapable of self-support, becomes capable of self-support." Payments of said amounts of compensation under said award and modified award were made and accepted in accordance therewith.

2(a). Except for the Report of the Army Board of Investigation into the sinking of the U. S. Army Tug LT-221, the identity of all reports, communications, memoranda (oral or written) by date; the nature thereof; the name, address and job classification of the person making or rendering the same and of the person or agency (governmental or otherwise) to whom directed are as indicated by the copies attached. The Report of said Board of Investigation is in the possession of The Honorable, The Secretary of the Army, Washington 25, D. C., and is a privilege document the contents of which may not be divulged.

2(b). The names, ratings and record addresses of the witnesses, all of whom were employees of the United States, are as follows:

Name	Rating	Address
Hunley, J. W.	Commanding Officer, *SS Ethelbert Nevin*	
Hambacher, Ernest A.	Master	120 Oak Hill Avenue, Long Branch, New Jersey
Thibodeau, Warren J.	1st Officer	198 Falcon Street, Boston, Massachusetts
Doyle, William G.	1st Engineer	35 Cottage Street, Watertown, Massachusetts
Louis, Walter P.	2nd Asst. Engineer	Route 1 Box 23, Deridder, Louisiana

Guice, James W.	Oiler	77 Jackson Avenue, Ocean Springs, Mississippi
McGinty, Berton E.	Fireman	Ocean Springs, Mississippi
Neumann, Lee A.	Acting Fireman	Box 582, Weslaco, Texas
Dimsdale, Delma D.	A.B. Seaman	Route 5, Covington, Georgia
Measles, Richard M.	A.B. Seaman	1816 Dumoine Street, New Orleans, Louisiana
Frankenhauser, Elvin A.	A.B. Seaman	Route 1, Gonzales, Texas
Elkin, George F.	Ordinary Seaman	214 East Second Street, Oswego, New York
O'Connell, Daniel J.	Ordinary Seaman	1050 West 79th Street, Chicago, Illinois
Linker, Charles W.	Chief Motor Machinists' Mate	U. S. Navy, LST 551, U. S. Naval Amphibian Force
Jones, William R.	Technician 4th Grade	Ships Complement Detachment, Jackson Barracks, New Orleans, Louisiana
Way, Robert L.	Lt., USNR	U. S. Naval Detachment, Cagliari, Sardinia
Johnson, Carl C.	Lt., USNR	U. S. Naval Detachment, Cagliari, Sardinia
Price, E. G.	Flight Officer	251 Air Sea Rescue, R.A.F., Cagliari, Sardinia
Walser, Henry R.	Lt. (jg), USNR	YWS 179 (Mine-sweeper), Cagliari, Sardinia

3. Except for the Report of the Army Board of Investigation referred to above, there are attached copies of all written statements, and memoranda of oral statements so far as known of persons who purport to be witnesses or to have knowledge relating in any manner to the accident, injuries or death, obtained by the respondent or its representatives.

4. The present whereabouts of the log books, if they survived the explosion and sinking, is not known. Copies of all other reports except for the Army Board of Investigation referred to above are attached so far as known.

5. Copies of all statements and reports by libelant or decedent and their representatives are attached so far as known.

6. No report of physical and medical examination relevant to the death of libelant's decedent or his physical condition at or about that time has been found.

7. The present location and identity of the persons having custody of the records and documents referred

to are The Honorable, The Secretary of the Army, Washington 25, D. C., and The Comptroller General of the United States, Washington 25, D. C..

GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent.

[Verification Omitted]

[Title of Court and Cause]

LIBELANT'S MOTION TO COMPEL RESPONDENT TO PRODUCE DOCUMENTS FOR INSPECTION PURSUANT TO RULE THIRTY-TWO

[Endorsed: Filed November 4, 1948]

Libelant above-named, by his proctors, Messrs. Freedman, Landy and Lorry, moves this Honorable Court to compel the respondent to produce the following papers and documents for inspection and copying:

(a) The Report of the Army Board of Investigation into the sinking of the Tug LT-221, including the notes of testimony of all witnesses taken in connection with the said investigation.

In support of this motion, libellant avers the following:

1. The within cause is an action to recover damages for the wrongful death of the decedent, a seaman, on board the Tug LT-221 on October 15, 1944, when the said vessel struck one or more mines and exploded near the port of Cagliari, Sardinia.

2. By reason of the nature of the disaster, libellant has practically no knowledge of the exact causes of this marine disaster and the exact and detailed facts relat-

ing thereto, and relating to the issues of the unseaworthiness of the vessel and the respondent's negligence, which were the proximate causes of this disaster and libellant's injuries.

3. The United States of America, through the United States Army and other representatives, has made extensive investigation of the causes of this disaster, some of which took place in Italy or Sardinia immediately following the disaster.

4. By reason of the immediate investigation made by the United States Army and other representatives of the respondent, the United States of America has come into possession of all of the books, papers, documents, maps and notes of testimony set forth in paragraph (a) supra.

5. Respondent has failed to attach copies of the foregoing to its answer to the interrogatories propounded by libellant.

6. Libellant's counsel has written numerous letters to the members of the crew of this vessel and to various agencies and parties who might have knowledge of the facts, or might have possession of the documents set forth above, but has received replies from only a few members of the crew, none of which contain facts relating to the courses of the vessel, the existence of minefields and information relating thereto, and other similar information, all relevant to the determination of the respondent's liability in this cause.

7. The aforesaid report and notes of testimony are not privileged in any way.

8. The production and inspection of documents sought herein is necessary for the proper preparation of the libellant's case for trial, not only to obtain information vital to the factual issues involved, but to afford him information for use in cross-examining and impeaching witnesses that will be called by the respond-

ent, to obtain information as to the existence or location of relevant facts, and because the witnesses can be reached by the libellant, if at all, with the greatest difficulty, as has been set forth above.

WHEREFORE, libellant prays this Honorable Court to require the respondent to produce the above papers and documents for inspection and copying within days from the date hereof.

FREEDMAN, LANDY AND LORRY,
By WILLIAM M. ALPER,
Proctors for Libellant.

TRANSCRIPT OF HEARING ON MOTION TO COMPEL RESPONDENT TO PRODUCE TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION HELD JANUARY 3, 1950.

[Title of Court and Cause]

Philadelphia, Pa., January 3, 1950.

Before HON. WILLIAM H. KIRKPATRICK, J.

PRESENT: FREEDMAN, LANDY, AND LORRY, ESQ., by ABRAHAM E. FREEDMAN, ESQ., and
WILLIAM M. ALPER, ESQ., representing Libellant.
GERALD A. GLEESON, ESQ., United States Attorney, by JAMES P. MCCORMICK, ESQ., Assistant United States Attorney, and the DEPARTMENT OF JUSTICE, by PATRICK F. COONEY, ESQ., representing Respondent.

[Endorsed: Filed January 12, 1950]

DISCUSSION

Mr. FREEDMAN: If the Court please, this is an application under Rule 34 to compel the production of cer-

tain documents in the custody and possession of the Respondent, the United States. In this situation a tug named the LT 221 on October 15, 1944, was entering the harbor of Cagliari, Sardinia, when it encountered an explosion and foundered and resulted in a number of deaths, included among which was the decedent involved in this case.

An investigation was conducted by the Army—I believe it was the Army Board of Inquiry—and we filed a series of interrogatories which were answered, and I will say something about that in a minute. The answers to the interrogatories disclosed all of the information, except that which was obtained in connection with this investigation by the Army Board of Inquiry. They gave us the names of witnesses. There were some 28, I believe, or 35 personnel on this tugboat. We have sent out about—I think it was 28, wasn't it?

MR. ALPER: 27, 13 of whom died.

MR. FREEDMAN: Twenty-seven or twenty-eight members of the crew. There were about twenty-seven or twenty-eight members of the crew, of whom thirteen died, and we sent out about 30 letters and got about four replies, which were not entirely negative but which did not disclose any real information concerning the circumstances of the foundering, didn't give us any facts at all so far as the cause of action here involved is concerned.

We now make application for the production of those statements, that is, the investigation conducted by the Army Board of Inquiry, and we would like to file with Your Honor an affidavit showing good cause. We gave a copy of this a few minutes ago to Mr. Cooney and to Mr. McCormick.

THE COURT: The suit is in admiralty, I presume.

MR. FREEDMAN: Yes, sir, Your Honor.

THE COURT: And is this an application under Rule 31 or 32?

Mr. FREEDMAN: This is an application under Rule 32. I said 34 before. That was an error before, Your Honor.

THE COURT: I mean, it is the same as 32.

Mr. FREEDMAN: Yes, sir, Rule 32 in admiralty, which requires a showing in good cause.

Now, the basis for our complaint, Your Honor, the good cause which we allege, is that we have tried to get in touch with the witnesses, without any success at all.

THE COURT: Do you have the opinion of the Alltmont case?

Mr. FREEDMAN: We didn't get any replies at all from the Master or one or two other key witnesses, so to speak. The Master, who is perhaps the most important witness now, refuses to give us any reply at all.

THE COURT: Are the facts you are now stating in your affidavit?

Mr. ALPER: That is right, they are in the affidavit.

Mr. FREEDMAN: And in addition to not being able to obtain the real, relevant and pertinent information, it strikes us, Your Honor, from a reading of the answers to the interrogatories, that they are more or less a summary of the facts and not a detailed statement of the facts themselves, and that, sir, is where I think our biggest complaint lies. I think we are entitled to a copy—not a copy—we are not entitled to a copy of the statements themselves in view of the recent decision in the Alltmont-O'Neill cases, but I do believe that we are entitled to a complete detailed account or else all of the information which they have from any source, regardless of the nature of the source. I think they must disclose to us every fact within their knowl-

edge and within their possession, regardless of how they got it.

Now, the answers to the interrogatories here don't give us any detailed account of the facts so that we can draw our own conclusions; they more or less give us a summary of what they believed happened, namely, that the vessel was proceeding in the mine-swept channel following another vessel and then suddenly it encountered this explosion. They do not give us the courses which were taken, the location of the mine fields, and all of the other relevant data which would have enabled us to draw our own conclusions and draw our own inferences and determine whether or not there is a cause of action.

THE COURT: Well, where are the answers?

Mr. FREEDMAN: The answers to the interrogatories?

Mr. ALPER: They should be in the record there.

Mr. FREEDMAN: Does Your Honor have a copy?

THE COURT: Well, I have the whole record here. I haven't located anything yet. Well, here are the Libelant's interrogatories that were filed February 3, 1948. Are those the ones you mean?

Mr. ALPER: I believe so.

THE COURT: Now, when were they answered?

Mr. FREEDMAN: We have got a copy of the answer here, but I don't have the date that they were answered.

Mr. ALPER: They were answered on September 17, 1948; they were filed on February 3, 1948.

Mr. FREEDMAN: February 3, 1949, you mean.

Mr. ALPER: 1948.

THE COURT: The answers were not.

Mr. ALPER: The interrogatories were filed September 17, 1948.

Mr. FREEDMAN: The interrogatories were filed on

February 3, 1948, and the answers were filed on September 17, 1948.

THE COURT: Well, I don't have the answers.

Mr. ALPER: Here is a carbon.

THE COURT: Well, all right.

Mr. FREEDMAN: Now, sir, as I said before, we allege good cause upon the basis of the fact that we are unable to obtain the information directly from the witnesses for the reasons stated, but even more important than that is the fact that in answer to interrogatories they should have given us a detailed statement of the facts which they had, the information which they have elicited from any source, and that they have not done; they have given us a summary and what appears to be an edited version of the facts which they have in their possession.

THE COURT: Well, in other words, you want the statements of the witnesses?

Mr. FREEDMAN: Well, I know we can't get the statements of the witnesses in view of the Alltmont-O'Neill decision, but we believe we are entitled, sir, to all of the information, every bit of information which is contained in those statements.

THE COURT: Do you think the Alltmont decision puts you out of Court on the matter of good cause?

Mr. FREEDMAN: Oh, I thought you meant—I will take that last statement out.

THE COURT: You cannot get copies.

Mr. FREEDMAN: We want the statements of the witnesses themselves, yes, sir. I thought Your Honor meant in answer to our interrogatories. We weren't entitled to the statements in answer to the interrogatories, although we were entitled to all of the information.

THE COURT: Yes.

Mr. FREEDMAN: We now want the statements themselves.

THE COURT: You don't concede that what Judge Maris said in the last paragraph puts you out of Court on that?

Mr. FREEDMAN: No, sir. Oh, no. No, I think that Judge Maris made it clear there that upon a showing of good cause we are entitled to copies of the statements—not copies, but the originals themselves.

THE COURT: "Since the Libellants have been furnished, through the Respondent's answers to the interrogatories, with the names and addresses of the persons who made the statements in question and are, therefore, in a position to interview them themselves, if they have not already done so, it is quite possible that the Libellants will be able to show such special circumstances in this case as would justify production of the statements in question."

Now, the only thing is you say that you are not in a position to interview them because they——

Mr. FREEDMAN: We tried, sir, to contact them, without success. As I said, we heard from four men who knew very little about it.

THE COURT: How many did you write to?

Mr. FREEDMAN: I think all in all we sent out about 35 letters, and I think we wrote to every one of the witnesses whose names were furnished to us in the answers to interrogatories.

Mr. MCCORMICK: I think Judge Maris' decision puts him out of Court after that, the mere fact that they had been given the names and addresses of the witnesses. The mere fact that the witnesses won't answer their letters doesn't throw upon the Respondent the burden of furnishing their statements.

THE COURT: Well, what is good cause?

Mr. MCCORMICK: Good cause may be that the wit-

nesses are not available, they can't be subpoenaed and they can't be interrogated, or their deposition taken.

THE COURT: Suppose you have their statement and the witnesses don't answer Mr. Freedman's letters. Suppose you know exactly what the witness said and you have a complete statement, and the witness simply says or writes to Mr. Freedman and says, "I won't give you any information."

Mr. MCCORMICK: Mr. Freedman has access to them with a subpoena to take their depositions.

THE COURT: Surely.

Mr. MCCORMICK: Consequently, what he has shown is inconvenience and not good cause. Under Judge Maris' decision I don't think inconvenience in getting witnesses' statements is sufficient to show good cause.

Mr. FREEDMAN: It amounts to a greater——

THE COURT: It is a pretty tough proposition on a plaintiff who hasn't got the resources to travel all over the country or send his counsel all over the country where you get a situation like this.

Mr. FREEDMAN: In addition to that, sir, I may say that many of the witnesses are U. S. Navy personnel, with no address given, and some are British Navy men with no addresses.

THE COURT: Let me see those answers.

Mr. AIPER: Third page.

THE COURT: I notice that you have given a list of witnesses here. Just to take the residences, they are given here as follows: New Jersey, Massachusetts, Massachusetts, Louisiana, Mississippi, Mississippi, Texas, Georgia, Louisiana, Texas, New York, Illinois; U. S. Naval Amphibian Forces, Jackson Barracks, Louisiana; Cagliari, Sardinia; Cagliari, Sardinia—all these are Navy personnel—Cagliari, Sardinia—there are four of those. One of them is British.

All right, go ahead.

Mr. COONEY: I think Mr. Freedman said that the main one he was interested in, the principal witness, was the Master. No effort has been made to take his deposition.

Mr. FREEDMAN: We are interested in all of them. We said the Master is one of the key ones. He is the Master; he is the key witness.

THE COURT: Where is the Master located? Is he in this list?

Mr. FREEDMAN: I think he lives somewhere in New Jersey; doesn't he?

Mr. COONEY: That is right.

THE COURT: What?

Mr. COONEY: He lives in New Jersey, I believe.

THE COURT: Oh, yes, Hambacker, Oak Hill Avenue, Long Branch, New Jersey.

What have you done about the Master?

Mr. FREEDMAN: We have written to him. Have you got copies of the letter?

Mr. ALPER: Well, I can state it. We wrote to him. He wrote back and said that he was very sorry about the incident, and that all he could say was that the ship hit a mine, as far as he could tell. And then we wrote back and asked him detailed questions, going into all the issues that are important in the case, and he replied to that letter by saying that in view of the fact that this was an Army tugboat and that he hadn't been released from wartime secrecy, he didn't feel that he could give us the details that we asked him for, but that he would write to the United States Army, and we heard no more from him.

Now, we then wrote to the War Department and told the War Department his position and asked the War Department whether or not in view of the fact that the war was over they would release him from secrecy, and we got a reply from them saying that they would re-

lease him from secrecy, and we so wrote him, and we haven't heard from him. He still doesn't want to talk.

Mr. COONEY: I think, really, that could be explored further.

THE COURT: What?

Mr. COONEY: I think that——

Mr. ALPER: As soon as we got down to details why he made claim to secrecy.

Mr. COONEY: You could compel him to testify under subpoena.

THE COURT: Of course, his deposition can be taken without too much difficulty, but he is only one.

Mr. FREEDMAN: Even so, we have got to make this distinction; it is all right to say that we can take his deposition, and even subpoena him possibly for the Court here if it is not more than a hundred miles, but if we don't know what negligence we have and if we ourselves don't know the real basis or the real cause for the explosion, it seems to me, sir, to be a useless gesture just to call him and take his deposition, unless he will cooperate with us and really tell us all that he knows about it.

Now, he has told the Government. He has testified at the Government inquiry and he has made a number of disclosures which apparently are very relevant and which they don't see fit to turn over to us. Now, we could ask him—we do not know about it—and he could answer the question in a sentence or two sentences telling us virtually nothing; on the other hand, if he really wants to cooperate and tell us all that he knows he can probably give us all of the information which could be useful in just testing whether or not there was any negligence on the part of the defendant or any unseaworthiness of the vessel which in any way contributed to this accident.

Now, this is a discovery proceeding, Your Honor, as

I said, and unless you have got a witness who will cooperate, then it seems to me that taking his deposition isn't the complete answer to it. It is not at all a satisfactory matter.

THE COURT: Well, suppose I agree with all you say, as it might be inferred that I do, nevertheless I am bound by the Court of Appeals' decision. What am I going to do about it? Judge Maris says it in so many words. Maybe he doesn't want to say it positively. Maybe if you are in a position to interview these people, or any of them, then it is quite possible that you won't be able to show special circumstances. Now, take the Master. He is one example. I suppose you would have to deal with the witnesses separately. Here is a man that you can interview. You are in a position to interview him.

Mr. FREEDMAN: Well, we have tried, sir.

THE COURT: Well, you have written to him.

Mr. FREEDMAN: And he won't talk to us, and certainly he has given an indication of hostility toward us and a non-cooperative attitude, which makes it quite clear that he is not going to tell us anything if he doesn't have to. Now, unless we know what it is that we are after, we can't make him tell us. Now, the only way we can find out is to get the statements which have previously been made. This is a discovery proceeding. If we can't get a complete recitation of all of the facts in answers to interrogatories, the only answer, sir, is the production of the statements themselves.

THE COURT: Of course, you are only repeating what I have said on numerous occasions, but——

Mr. FREEDMAN: I know, sir, and while to a certain extent the Court of Appeals in the Alltmont-O'Neill case might have overruled Your Honor's decision in the DeBruce and other cases, nevertheless I think the Court has made it clear that in answers to our inter-

rogatories they have got to give us all of the facts, not edited or paraphrased or cut down or summarized; they have got to give us all of the facts, the unvarnished facts. Now, if we can't get that——

THE COURT: The only way they can do it is by giving you the statements. You either get the edited statements or they give you the statements.

Mr. FREEDMAN: That is right.

THE COURT: There is no intermediate ground. If they don't give you the statements, what they give you is an edited edition of the statements or a paraphrased edition.

Mr. FREEDMAN: Well, that is what would seem to be the consideration here, and the paraphrased edition that we have doesn't give any comfort at all, doesn't really tell what happened. Now, if we had the unvarnished facts, the bare, plain facts of the witnesses——

THE COURT: That is what the Court of Appeals says you should have; it says you can't get any more than that. They had all the arguments before them and they decided that that was the kind of discovery that they wanted. Those arguments were all before them. Is there anything else anybody else wants to say?

Mr. COONEY: The only thing is he raised some questions as to the answers he received in the interrogatories not being complete. I think Your Honor made about the best answer to that, but also I believe that he has been given as complete a story as possible in those interrogatories and in the documents filed with them. I also feel that we should be given an opportunity to answer this affidavit which was really not filed at the time the motion was filed.

THE COURT: I don't know what it says. I haven't read it yet. I will have to take counsel's statement for it.

Mr. COONEY: It does not show good cause in that the——

Mr. FREEDMAN: Mr. Cooney, may I ask a question?

Mr. COONEY: Surely.

Mr. FREEDMAN? Have you given us every fact, every bit of information which is relevant to these proceedings in the answers to the interrogatories?

Mr. COONEY: I think so. Now, part of the difficulty may be with the form of the interrogatories themselves. Maybe if the interrogatories were more detailed and explicit as to exactly what you want there would be much less opportunity for these type of arguments arising as to whether it is everything, which I think it is, but I think that is part of the problem of getting more detailed and more explicit interrogatories.

THE COURT: Well, his real problem is that he can't frame the kind of explicit interrogatories he wants, unless he has talked to the witnesses, and the witnesses don't talk to him or don't answer his letters, or whatever it is. Unless he can get the statements that they gave you he doesn't know how to frame explicit interrogatories.

Suppose there is some defective piece of machinery on the ship. He doesn't know what it is. He can't be explicit about it. He can say, "Was there any defect in the ship's machinery?" or something like that. I suppose it is the best he can do, but he would be a darn sight better off if he could say, "Was the third pipe from the boiler on the port side rusted through?"

Mr. COONEY: It may not be necessary to go into that in complete detail, but for a sample I was just looking at this affidavit here, and it says, "The location of the aforesaid mine fields, the location and the course of the free channel, exact course and headings of the channel, what type of mine was struck, whether its degaussing apparatus was in use." I mean, they are the type of

questions that could, I think, be asked directly in the interrogatories, and that should relieve his mind as to whether——

Mr. FREEDMAN: Well, let me ask you this, Mr. Cooney. Our first interrogatory, which has been approved after a considerable conference with all of the bar here, was more or less drafted by Respondents and Libellant's counsel with the approval of the Court—I think I am correct in that, am I not, Your Honor?

THE COURT: I think it was so, yes.

Mr. FREEDMAN: And that requires you to state all of the facts that you know about that are relevant in these proceedings. Now, what I would like to know from you is whether or not you have given us all of the facts.

Mr. COONEY: Yes, in the answers to the interrogatories.

Mr. FREEDMAN: In the answers to the interrogatories?

Mr. COONEY: Except——

Mr. FREEDMAN: Except what, Mr. Cooney?

Mr. COONEY: No, we have given you all the facts. We have not given you the statements of the witnesses before the Army Board of Investigation.

Mr. FREEDMAN: Well, I don't want to play with words, Mr. Cooney, but what I am asking you now is whether you have given us all the facts, and that means the facts which are in those statements as well as any place else.

THE COURT: That is right, facts—he is not talking about the statements. Have you given the facts that were given you by the witnesses before the Army Board of Investigation?

Mr. COONEY: Yes, sir, but before we go into this further, there is a point that I wanted to make. That is that this petition was filed today and we received a copy today.

Mr. FREEDMAN: You mean the affidavit?

Mr. COONEY: The affidavit, rather. And on this information, for example, the exactness and all, I think it would be best put if it is gone into in an affidavit in answer to this, which we should really have an opportunity to answer the affidavit with a motion under the Rules.

THE COURT: No, but I would like to know what the status of the case is. Now, you had an Army Board investigation and all the witnesses made statements at that time, and undoubtedly those statements disclosed certain facts. They dealt with facts and they told you. Now, have you in the answers to interrogatories given all the facts which the witnesses at the Army Board investigation disclosed? That is a fair question. I want to know where we stand. Or have you felt that under your privilege you could withhold certain facts, not copies of the statements, but certain facts because they were obtained in statements from witnesses called before the Army Board? Do I make myself clear, Mr. Cooney?

Mr. COONEY: Yes, I would say in answer to interrogatories, facts that were developed at the Board of Investigation, without necessarily being identified with the particular witness who gave them, or opinions of particular witnesses.

THE COURT: That is what I mean, yes.

Mr. COONEY: They are set forth in the interrogatories.

THE COURT: They are all set forth?

Mr. COONEY: Yes, sir.

THE COURT: Well, all right.

Mr. COONEY: But I would like——

Mr. FREEDMAN: I take it that you have given us every fact?

THE COURT: That is what he says. That is what I

understand him to say, that he has given every relevant fact, no matter where it was.

Mr. COONEY: Since these particular interrogatories —I would like, possibly, an opportunity to review them and actually check the data.

THE COURT: Oh, yes. You haven't actually seen the affidavit. I don't want to rush you.

Mr. FREEDMAN: But it is clear that you in your answers to the interrogatories have given us every fact which you knew about which you obtained from this Army Board of Inquiry or from any other source? That is clear now as far as we are concerned?

THE COURT: That is what he said.

Mr. COONEY: That is as distinguished from opinions, and so forth.

THE COURT: I understand. That is what I meant. Now, what do you want me to do?

Mr. FREEDMAN: And we would like Your Honor to enter an order, sir——

THE COURT: I know, but if he wants to answer your affidavit he is entitled to it.

Mr. FREEDMAN: Oh, yes.

THE COURT: If that is what you want.

Mr. COONEY: That is the first thing we want.

THE COURT: Well, all right, I will certainly give you an opportunity to do that.

Mr. COONEY: Because we received the affidavit today. We would also like an opportunity to file a brief.

THE COURT: That is what I mean. If you want to file an affidavit, that is all right, and if you want to file a memorandum with it, it is all right.

[Verification Omitted]

[Title of Court and Cause]

RESPONDENT'S AFFIDAVIT IN OPPOSITION TO THE MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed January 12, 1950]

WASHINGTON,
District of Columbia, ss:

Patrick F. Cooney, being duly sworn, deposes and says that he is an attorney in the Admiralty and Shipping Section of the Department of Justice and has been charged with the general handling of this case; that the matter is being handled by the United States Attorney's office in Philadelphia under the directions of the Department of Justice in Washington, and that all papers and documents are in the possession of the Department of Justice in Washington; and that the following statements, upon information and belief, are based upon investigations, files, and documents in the possession of the Department of Justice:

(1) This affidavit is filed in answer to an affidavit by proctor for libelant and in opposition to libelant's motion in the instant case seeking to compel respondent to produce the confidential proceedings of an Army Board of Investigation into the sinking of the tug LT-221 on October 15, 1944. The issue is whether libelant by a motion for discovery can obtain the confidential proceedings of the Army Board of Investigation and whether the affidavit of proctor for libelant, filed January 3, 1950, in support of the motion, shows good cause.

(2) The claim of privilege is asserted since the Army investigation was directed at discipline and the efficiency of the armed service during time of war, and the witnesses testified under service regulations of confidence and security.

(3) Good cause for the discovery has not been shown in that libelant has been furnished, through respondent's answers to interrogatories, with the names and addresses of the persons who made the statements to the Army Board of Investigation and libelant is therefore in a position to interview them; that the affidavit in support of libelant's motion does not allege that such action has been taken or that any effort has been made by libellant to interview or to take the deposition of any of these persons.

(4) Relative to the particular information which the affidavit in support of the motion states the libellant desires to obtain, and to further show that production of the Army Board of Investigation is not necessary, the following is stated:

(a) All reports, communications and memorandums except for the Army Board of Investigation have been filed in answer to libelant's interrogatories.

(b) That libelant has been furnished, in answer to his interrogatories, a statement as to the vicinity in which the vessel went down; that I am having corrected, in the answers to the interrogatories, a typographical error as to the latitude of this location.

(c) That by affidavit attached to respondent's motion to dismiss previously filed herein, R. L. Hiller, Assistant United States Attorney, stated, upon information and belief, that the vessel was sunk in a mine field.

(d) That as to the exact course and headings of the vessel and its navigation, libelant was advised in response to his interrogatories that the present whereabouts of the log books, if they survived the explosion and sinking, is not known. Moreover, that libelant has been furnished the names and

addresses of the master and the first officer aboard the vessel, the officers responsible for navigation at the time; that libelant's own affidavit reveals that permission has been granted by the War Department for the master of the vessel to disclose his knowledge surrounding the sinking of the LT-221, but that the libelant has not made any effort to interview the master and the first mate of the vessel or to obtain their depositions. The last known address of the master, as shown by answers to interrogatories, was 120 Oak Hill Avenue, Long Branch, New Jersey, within 100 miles of Philadelphia.

(e) That proctors for libelant are or should be familiar with the various publications of the United States Hydrographic Office which contain information relative to the location of the mine fields and danger areas, as well as the courses and headings of the free channels in the Mediterranean area, which include the Gulf of Cagliari and which can be obtained upon payment of the usual fee. A copy of Mediterranean Route Instructions No. 1 (Hydrographic Office Misc. Pub. No. 11639) has been furnished to opposing counsel in connection with the *Allmont* and *O'Neill* cases which involve mine explosions in the Mediterranean area; further, that libelant in his interrogatories did not request specific information relative to channel locations in mine areas, although he had requested information of this type in the *O'Neill* case; a copy of the chart of the Cagliari area as of the date in question, with the channel and danger area marked thereon, is being obtained from the Department of the Navy and will be made available for examination by libelant. The chart of the area is available to libelant from the United States Hydrographic Office.

(f) The Army Board of Investigation contains no information as to the type of mine struck, whether the vessel's degaussing apparatus was in use and whether proper and sufficient lookouts had been posted; the respondent has not investigated these points any further.

5. Libelant does not show good cause nor does he show that the documents sought are not privileged.

PATRICK F. COONEY.

Sworn to and subscribed before me this 11 day of January, 1950.

SARA E. KIDWELL,
Notary Public, D. C.

My Commission expires Sept. 14, 1951.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT IN SUPPORT OF THE MOTION FOR THE PRODUCTION OF DOCUMENTS

[Endorsed: Filed August 14, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
City & County of Philadelphia, ss:

WILLIAM M. ALPER, being duly sworn according to law, deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that the within suit has been brought to recover damages for the wrongful death of the decedent while serving as a member of the crew of the Tug "LT-221" on October 15th, 1944; that the said vessel struck a mine causing an explosion while the vessel was enter-

ing the port of Cagliari, Sardinia, as a result of which the vessel foundered, causing the death of about half of the vessel's crew of about twenty-seven persons; that the United States of America, through the United States Army and other representatives and agents of the respondent, made an extensive investigation of the cause of this disaster and the facts relating thereto; upon information and belief, that shortly after the disaster the United States Army Board of Investigation interviewed and obtained sworn statements from all witnesses to this marine disaster and all persons having information as to the events preceding, leading up to and surrounding the explosion and sinking; upon information and belief, that the Tug "LT-221" was entering the harbor through a channel traversing a known mine field; that, in connection with the instant case, it will be necessary to determine the exact location of the aforesaid mine fields, the location and course of the free channel, if any, the exact courses and headings of the channel, the exact courses and headings of the vessel in entering the harbor before the explosion, whether the vessel deviated from the prescribed courses and headings, whether the vessel struck a floating mine or was navigated into a fixed mine field, what type of mine was struck, whether the vessel's degaussing apparatus was in use and whether proper and sufficient lookouts had been posted; that the respondent filed answers to the libellant's interrogatories on or about September 20th, 1948; that the aforesaid answers to interrogatories do not purport to supply information concerning the foregoing issues; that the affiant mailed approximately thirty-five letters to survivors of the disaster and witnesses identified in the answers to interrogatories; that libellant received only four letters from crew members which state that the tug struck a mine

but no information on the many relevant issues outlined above; that the libellant received a short letter from the master of the tug indicating the vessel struck a mine; that libellant again wrote to the master requesting detailed information regarding the disaster; that the master requested permission from the War Department to reply to libellant's letter, received no reply and, accordingly, refused to furnish the requested information; that thereafter, the libellant requested and obtained permission from the War Department for the master to disclose these facts to the libellant; that the libellant has been unable to interview the master and obtain a statement from the master; that the libellant did not receive replies from the witnesses identified in the respondent's interrogatories other than set forth above; that the production and inspection of the documents shown herein is most necessary for the proof of plaintiff's-libellants' causes of action and for the preparation of the cases for trial; unless said material is made available to plaintiffs-libellants, they may be unable to prove the actual facts upon the basis of which these causes of action can be sustained; production is necessary for purposes of discovery since all the defendants-respondents, by virtue of their investigative agencies and other broad facilities have had almost exclusive access to the facts of the occurrence here involved; production will also be necessary to prepare for any defense that might be raised by the defendants-respondents, and to properly cross-examine defendants'-respondents' witnesses, and for impeachment, if necessary.

WILLIAM M. ALPER.

Sworn to and subscribed before me this 3rd day of January, 1950.

[Title of Court and Cause]

OPINION OF DISTRICT COURT SUR LIBELANT'S MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed Aug. 14, 1950]

Before Kirkpatrick Ch. J.

This is an action under the Suits in Admiralty Act. The libellant is the administrator of a seaman who was killed when a vessel belonging to and operated by the United States struck a mine in an Italian port on October 15, 1944. The libel charges negligence in the navigation of the vessel, in failing to provide an adequate lookout, in failing to maintain adequate degaussing, life saving equipment and warning devices, and in other particulars.

It appears that shortly after the disaster, in the course of a proceeding before an Army Board of Investigation, sworn statements were obtained from all the witnesses to the actual sinking and from persons having information as to the events preceding and surrounding it.

The libellant filed a number of interrogatories asking for relevant facts known to the respondent. One interrogatory asked for the production of copies of all written statements (signed or unsigned) of witnesses obtained by the United States or its representatives. This, of course, includes the testimony of witnesses before the Army Board of Investigation. The respondent has answered the fact interrogatories and has produced a number of reports, communications and memoranda but has refused to produce any statements either oral or written procured by the Army Board of Investigation. This motion is to compel their production.

Both parties recognize that, since the decision of the

Court of Appeals for the Third Circuit in Alltmont v. United States, 177 F. 2d 971, this Court cannot order the production of copies of statements of witnesses under Admiralty Rule 31 (Civil Rule 33) and so obviate the necessity of showing the good cause required by Admiralty Rule 32 (Civil Rule 34). The motion does not specifically refer to either rule and it, therefore, will be treated as a motion under Rule 32 for the production of the documents. Good cause must be shown.

An affidavit has been filed by counsel for the libellant in which it is alleged that the information given by the respondent in response to the fact interrogatories does not give him information upon a number of points which he needs in order to prepare and prove his case and to cross-examine the respondent's witnesses; that the crew consisted of 29 of whom about half survived and that he has mailed some 35 letters to survivors and other witnesses identified by the respondent; that he has received only four letters from crew members, stating that the ship struck a mine but giving no information relating to the issues of negligence raised by the pleadings. The respondent does not question the truth of these statements.

In an opinion recently filed by this Court (Brauner v. United States, Civil Action No. 9793) it was pointed out that the mere fact that the party seeking production of statements given by witnesses has the witnesses' names and knows where to find them does not, under all circumstances, bar his right to have the statements produced. In the Alltmont case, supra, the Court of Appeals, in its order amending the original opinion, said no more than that if witnesses can be interviewed without undue burden or delay "it is quite possible" that the party asking for their statements "will be unable to show good cause". The plain implication is that undue burden or delay in interviewing the witnesses

may constitute good cause for acquiring the production of their statements.

The list of the witnesses in this case whose statements have been taken by the respondent, furnished by it in answers to interrogatories, shows that two of them reside in Mississippi, two in Texas, three in Louisiana, two in Massachusetts, one in Georgia, one at Oswego, New York, one in Chicago, and that the addresses of three (who were at the time of the answers Navy personnel) were Cagliari, Sardinia, and that one was a member of the Royal Air Force, with the same address. Attempted correspondence with these witnesses has proved unproductive. Even if more letters had been received they would have been no substitute for interviews and depositions. In view of the distances involved and the expense and difficulty of reaching the witnesses, it is plain that good cause exists for requiring the production of their statements.

The master's statement is a different matter. He resides within 100 miles of Philadelphia and it does not appear that his deposition cannot be taken. It may be that for one reason or another (see opinion in Brauner v. United States, supra) after the taking of the deposition good cause for the production of the statement can still be shown. This, however, is not before me at the present time.

In Brauner v. United States, supra, this Court, for reasons which need not be repeated here, held that the report of the Army Board of Investigation and the statements taken at that time are not privileged.

The libellant's motion will be granted except as to the statement of the master.

[Title of Court and Cause]

CLAIM OF PRIVILEGE BY THE SECRETARY, DEPARTMENT OF THE ARMY

[Endorsed: Filed October 9, 1950]

This Honorable Court, after a hearing on a motion of libelant to compel production of all statements of witnesses obtained by the United States or its representatives, indicated in its memorandum opinion that the expression "statements of witnesses" included the official transcript of the testimony of the witnesses before the Board of Officers created to investigate and inquire into the sinking of the Army Tug LT-221 in the presence of the enemy on October 15, 1944, and that libelant's motion will be granted except as to the "statement" (i.e., the official transcript of testimony) of the master of the Army Tug LT-221.

The Army Tug LT-221 was a public vessel of the military forces of the United States operated by the Army Transport Service. The vessel was engaged exclusively in a military operation in time of war when it was sunk in the Gulf of Cagliari in a mine field in a forward combat area. The Report of the Board of Officers concerning the sinking of the Army Tug convened at Headquarters, Allied Garrison, Sardinia, on October 20, 1944, was rendered pursuant to the provisions of Army Regulations 420-5 and other pertinent regulations. This investigation, directed at the discipline and efficiency of personnel and organizational components of the armed services, was conducted during war time and testimony was taken under service regulation of security and confidence.

Custom, precedent, and rules of the Department of the Army, as recorded in paragraph 29, Army Regulations 420-5, 20 May 1940, copy of which is attached

hereto, marked "Exhibit A", consider reports by boards of officers to be confidential in character and forbid the furnishing of copies thereof to persons inside or outside the Department of the Army, other than officials authorized by chain of command or administration to receive them, except with my special approval in each case.

In my official capacity as the Secretary of the Army, I have examined the Report of the Board of Officers, rendered in conformity with Army Regulations 420-5 concerning the sinking of the Army Tug LT-221, and find that it contains information by inferior to superior military personnel as to the discipline and efficiency of military personnel and organizational components of the armed services; that it relates to the internal management of the Department of the Army; that it is confidential for good cause found; that the production of the whole or any part thereof in this proceeding would be contrary to the public interest. Therefore, pursuant to my authority as head of the Department of the Army, I assert the privileged status of the Report of the Board of Officers, and of every part thereof, and most respectfully decline to permit the whole or any part thereof to be produced in this action.

(S.) FRANK PACE, JR.,
Secretary of the Army.

AFFIDAVIT OF RALPH R. SEARS, COLONEL, TRANSPORTATION CORPS, UNITED STATES ARMY

[Endorsed: Filed October 9, 1950]

AFFIDAVIT

I, Ralph R. Sears, Colonel, Transportation Corps, United States Army, being duly sworn depose and say:

I am the Chief of the Terminal Operations and Installations Division, Office of the Chief of Transporta-

tion, United States Army. I have held my present position since August 22, 1950 and a part of the duties of my office and those of my predecessors is maintaining regular records in the Office of the Chief of Transportation covering the assignment, employment and activities of vessels of which the Transportation Corps of the United States Army has control.

That based upon these records kept in the regular course of the operations at my office, it is my information and belief that the vessel, Army Tug LT-221, was built in 1943 specifically for the United States Army by the Marietta Manufacturing Company, Point Pleasant, West Virginia, and upon completion was immediately delivered to and accepted by the Army on October 7, 1943, and that the said Army Tug LT-221 was continuously owned and operated solely by the United States Army from the date of her aforesaid delivery until the date of her sinking in October 1944. Furthermore, to the best of my information and belief, at all times during the voyage on which the LT-221 was engaged when she was sunk, she was assigned to the North African Theater of Operations for service in time of war in military operations, and she was not engaged at any time in commercial service or employed as a merchant vessel.

RALPH R. SEARS,
Colonel, TC,
Chief of Terminal Operations and
Installations Division,
Office of the Chief of Transportation,
United States Army.

STATE OF VIRGINIA,
County of Arlington, ss:

Sworn and subscribed to before me this 2 day of October 1950.

FREDA B. BRILL,
Notary Public,
Arl. Co. Va.

My commission expires March 14, 1951.

AFFIDAVIT OF MR. ALEXANDER COREY, CHIEF OF THE CIVILIAN PERSONNEL BRANCH, PERSONNEL DIVISION, OFFICE OF THE CHIEF OF TRANSPORTATION, UNITED STATES ARMY

Mr. Alexander Corey, Chief of the Civilian Personnel Branch, Personnel Division, Office of the Chief of Transportation, United States Army, after being duly sworn, deposes and says:

That while in the Military Service in the capacity of an officer of the Army of the United States, I became Chief of the Civilian Personnel Branch of the Office of the Chief of Transportation, United States Army, on or about April 1942, at the time when the Transportation Corps was first organized, and that I continued in such capacity, together with performing the responsibility for labor relations in that office to the date of my discharge from the Military Service in August 1946, at which time I assumed like duties in the same office and with my present title, and that I have been continuously engaged in that position to the present time.

That there is maintained in this Branch, under my jurisdiction, and has been regularly maintained since

its organization, records of the authorized manning scale of vessels operated directly by the Army. That these records, now in my office, show that the United States Army had authorized on 7 December 1943, a full manning scale, as authority for the complete crewing (civilian ship's officers, including master and men) of the Army Tug LT-221 by civilian employees of the United States Army, engaged under Civil Service rules pertinent to such marine type of employment. That such authority for crewing the Army Tug LT-221 in this fashion by United States Government civilian employees is shown by the records of this Branch to have continued until 27 October 1944.

That the authorization of the employment of such civilian crew members was for full-time employment, solely in connection with the operation of said vessel by the United States Army without the intervention of any other employer.

(S.) ALEXANDER COREY,
Chief, Civilian Personnel Branch,
Personnel Division,
Office of the Chief of Transportation,
United States Army.

STATE OF VIRGINIA,
County of Arlington, ss:

Sworn and subscribed to before me this 15th day of September 1950.

(S.) FREDA B. BRILL,
Notary Public,
Arl. Co. Va.

SEAL.

My commission expires Mar. 14, 1951.

[Endorsed: Filed Oct. 9, 1950]

[Title of Court and Cause]

RESPONDENT'S MOTION FOR REHEARING UPON LIBELANT'S MOTION FOR PRODUCTION OF DOCUMENTS

[Endorsed: Filed October 17, 1950]

Comes now the respondent and moves this Honorable Court for a rehearing upon libelant's motion to compel the production by the United States of the proceedings before an Army Board of Investigation created to investigate and inquire into the sinking of the Army Tug LT-221 and states his ground therefor as follows:

1. The instant libel was instituted under the jurisdictional provisions of the Suits in Admiralty Act to recover for the death in the performance of duty in the presence of the enemy of a public vessel crew member of a vessel operated by the armed services. The claim of jurisdiction under the Suits in Admiralty Act has been denied by the United States. Exceptive allegations have been filed of record, challenging this Court's jurisdiction under the Suits in Admiralty Act or any other jurisdictional statute. The United States has further asserted as a bar to libelant's action the affirmative defense that the liability of the United States to a public vessel crew member injured in the performance of duty aboard a vessel operated by the armed services is exclusively under the Federal Employees' Compensation Act.

2. Consideration of any issue of negligence or unseaworthiness to which the record of the Army Board of Investigation could be pertinent presupposes a determination of these questions of jurisdiction and of the bar of the Government's exclusive liability under the Federal Employees' Compensation Act. No final determination has as yet been made as to either the ques-

tion of this Court's jurisdiction or as to the bar resulting from the exclusive liability of the United States under the Federal Employees' Compensation Act. These questions must be determined before the United States may be called upon to produce any part of the report of proceedings of the Army Board of Investigation.

3. The jurisdiction of the Court and the effect of the exclusive liability under the Federal Employees' Compensation Act should be determined first or at least at the same time that this Court determines whether it may properly order the production of the record of the proceedings of the Army Board of Investigation.

4. In connection with the question of jurisdiction and the effect of the exclusive liability of the United States under the Federal Employees' Compensation Act, this Court should consider the record before the Bureau of Employees' Compensation relating to the compensation claim on account of libelant's decedent. The United States desires to file a transcript of that record prior to further consideration of these questions by this Court.

5. If this Court should determine that it has jurisdiction and that the exclusive liability of the United States under the Federal Employees' Compensation Act does not bar this action, consideration of the documents which the United States has filed of record since this Court's opinion of August 15, 1950, is necessary before any final determination regarding the production of the record of the Army Board of Investigation should be made. These documents are as follows:

Claim of privilege by the Secretary, Department of the Army.

Affidavit of Ralph R. Sears, Colonel, Transportation Corps, United States Army.

Affidavit of Alexander Corey, Chief of Civilian Personnel Branch, etc., United States Army.

6. The claim of privilege made by the Secretary of the Army for the record of the proceedings of the Army Board of Investigation convened to investigate a casualty occurring in a war zone in the presence of the enemy demands further consideration by this Court in view of the action which this Court has taken in the case of *Brauner* v. *United States*, Civil No. 9793. As the Secretary has determined that the record cannot be produced, this Court, if it determines that it has jurisdiction and the action is not barred, must decide the form of the interlocutory decree against the United States which it will enter.

WHEREFORE respondent prays for a rehearing and for such other and further relief as is just.

Respectfully,

(S.) GERALD A. GLEESON,
United States Attorney,

To: Freedman, Landy and Lorry,
900 Jefferson Building,
1015 Chestnut Street,
Philadelphia 7, Pennsylvania:

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 30th day of October, 1950, or as soon thereafter as counsel can be heard.

(S.) GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT RE PRODUCTION OF MASTER'S TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION

[Endorsed: Filed October 24, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
County of Philadelphia, SS.

WILLIAM M. ALPER, being duly sworn according to law, deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that the within suit has been brought to recover damages for the wrongful death of the decedent while serving as a member of the crew of the Tug "L.T.-221" on October 15, 1944; that upon information and belief, the said vessel struck a mine while the vessel was entering the port of Cagliari, Sardinia, causing an explosion, as a result of which the vessel foundered, causing the death of about half of the vessel's crew; that the United States of America, through the United States Army and other representatives and agents of the respondent, made an extensive investigation of the cause of this disaster and the facts relating thereto; that shortly after the disaster the United States Army Board of Investigation interviewed and obtained sworn statements from all witnesses to this marine disaster and all persons having information as to the events preceding, leading up to and surrounding the explosion and sinking; that the libellant filed a motion for production of the statements taken in the record of proceedings of the aforesaid investigation; that on August 14, 1950 Judge William H. Kirkpatrick filed an opinion directing the respondent to produce statements of these witnesses

except the statement of the Master, Ernest A. Hambacher; that your affiant endeavored to obtain information relative to the aforesaid explosion from Hambacher by letter and that this information was refused on the ground that Hambacher considered himself to be under a pledge of secrecy and could not discuss the accident with your affiant unless he was specifically authorized to do so by the United States Army; that subsequent to the opinion filed in this case on August 14, 1950, your affiant personally endeavored to discuss the case with Hambacher at his home and that Hambacher reaffirmed his position, as set forth above; that both Hambacher and your affiant requested the United States Army to authorize and permit Hambacher to discuss this case with your affiant but without success.

WILLIAM M. ALPER.

Sworn to and subscribed before me this 24th day of October 1950.

JESSIE D. VALENTI,
Notary Public.

My Commission Expires Jan. 4, 1953.

CERTIFIED COPIES OF DOCUMENTS IN THE FILE OF THE BUREAU OF EMPLOYEES' COMPENSATION, RELATING TO THE CASE OF ROBERT WILLIE DILLEHAY JR.

[Endorsed: Filed October 25, 1950]

DEPARTMENT OF LABOR

Washington, October 12, 1950.

I hereby certify that the annexed are true copies of documents in the case of Robert Willie Dillehay, Jr., fatally injured October 15, 1944, while employed as Third Assistant Engineer by the War Department, Transportation Corps aboard the U.S.A.T. LT-221

(Case No. X-93871). Also certified statement of compensation payments made in such case as shown by the records of the Bureau of Employees' Compensation, U. S. Department of Labor.

on file in the Bureau of Employees' Compensation, U. S. Department of Labor, Washington, D. C.

WILLIAM MCCAULEY,
Director.

OFFICE OF THE SECRETARY

I hereby certify that William McCauley who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Employees' Compensation, U. S. Department of Labor and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 18th day of December one thousand nine hundred and fifty.

(S.) MAURICE J. TOBIN,
Secretary of Labor.

Federal Security Agency

BUREAU OF EMPLOYEES' COMPENSATION
Washington 25, D. C.

November 12, 1949

File No. X-93871

Mrs. Eleanor D. McNamee
1315 Marlborough St.
Philadelphia, Pa.

Dear Madam:

Reference is made to the case of Robert Willie Dillehay, Jr., who was fatally injured while employed by the Federal Government.

The Federal Employees' Compensation Act, as amended by Public Law 357, 81st Congress, approved October 14, 1949, provides for increased compensation beginning November 1, 1949, as follows:

Child —— $87.91 per month

Within 10 days after December 1, 1949, a check for $87.91 will go forward to you representing compensation at the new rate for the month just past.

THIS COMPENSATION IS THE MOST THAT CAN BE ALLOWED UNDER PRESENT LEGISLATION.

All the other terms, conditions and limitations stated in your original notice of award remain unchanged and compensation for any period preceding November 1, 1949, is not affected.

Very truly yours,

BUREAU OF EMPLOYEES' COMPENSATION.
s/s AK

File No. X-93871

Adjustment of Death Benefits Under Public Law 357 —81st Congress—Approved October 14, 1949

(1) Date of Injury—10/15/44
(2) Monthly pay when injured—$228.33 ($45.00—S & Q)
(3) Increase monthly pay rate ..... 10% (Strike out percentage increase not applicable) $22.83.
(4) Monthly pay rate for compensation beginning November 1, 1949—$251.16
(5) Entitlements

(a) Widow	% Monthly award	
(b) Children (1)	35 % Monthly award	$87.91
(c) Parents	% Monthly award	
(d) Brothers and Sisters	% Monthly award	
(e) Grandparents and Grandchildren	% Monthly award	
Total Monthly Compensation		$87.91

(6) Payees

(a) Widow	$87.91
(b) Children	
(c) Parents	
(d) Others	

(See File or payroll transcript for names and addresses of payees)

Date Nov. 10, 1949 Examiner s/ WJH
Date FWH Nov. 11, 1949 Certified s/ FWH

Statement of Compensation Payments in the case of Robert Willie Dillehay, Jr., fatally injured October 15, 1944, while employed as Third Assistant Engineer by the War Department, Transportation Corps aboard the U.S.A.T. LT-221, Case No. X-93871 by the BUREAU OF EMPLOYEES' COMPENSATION, FEDERAL SECURITY AGENCY & DEPT. OF LABOR

		Amount Paid	Date Paid
Payments to Mrs. Eleanor B. Dillehay, natural guardian for Doris Ann Dillehay, her daughter from October 16, 1944 to June 30, 1946.		$288.75	3/10/46
		8.75	3/16/46
		8.75	4/1/46
		8.75	4/16/46
		8.75	5/1/46
		8.75	5/16/46
		8.75	6/1/46
		8.75	6/16/46
		8.75	7/1/46
		$358.76	
Payments to Mrs. Eleanor D. McNamee, natural guardian for Doris Ann Dillehay, her daughter, from October 16, 1944 to February 13, 1946 (date of widow's marriage)	$278.33		
from February 14, 1946 to June 30, 1946	199.79		
	$478.62		
Less amount previously paid for the period October 16, 1944 to June 30, 1946	358.75	$119.87	7/8/46
Payments to Mrs. Eleanor D. McNamee, natural guardian for Doris Ann Dillehay, her daughter from July 1, 1946 to September 30, 1950.		21.88	7/16/46
		21.88	8/1/46
		21.88	8/16/46
		21.88	9/1/46
		21.88	9/16/46
		21.88	10/1/46
		21.88	10/16/46
		21.88	11/1/46
		21.88	11/16/46
		21.88	12/1/46
		21.88	12/16/46
		21.88	1/1/47
		21.88	1/16/47
		21.88	2/1/47
		21.88	2/16/47
		21.88	3/1/47
		21.88	3/16/47
		21.88	4/1/47
		21.88	4/16/47
		21.88	5/1/47
		21.88	5/16/47
		21.88	6/1/47
		43.75	7/1/47
		43.75	8/1/47
		43.75	9/1/47

43.75	10/1/47
43.75	11/1/47
43.75	12/1/47
43.75	1/1/48
43.75	2/1/48
43.75	3/1/48
43.75	4/1/48
43.75	5/1/48
43.75	6/1/48
43.75	7/1/48
43.75	8/1/48
43.75	9/1/48
43.75	10/1/48
43.75	11/1/48
43.75	12/1/48
43.75	1/1/49
43.75	2/1/49
43.75	3/1/49
43.75	4/1/49
43.75	5/1/49
43.75	6/1/49
43.75	7/1/49
43.75	8/1/49
43.75	9/1/49
43.75	10/1/49
43.75	11/1/49
87.91	12/1/49
87.91	1/1/50
87.91	2/1/50
87.91	3/1/50
87.91	4/1/50
87.91	5/1/50
87.91	6/1/50
87.91	7/1/50
87.91	8/1/50
87.91	9/1/50
87.91	10/1/50
Total	$3,195.74

Certified True Statement

E. W. Laws
Fiscal Officer

Federal Security Agency

Bureau of Employees' Compensation

Washington 25, D. C.

Pursuant to the provisions of Section 1601, Chapter 10, Title 42, United States Code, I hereby certify that the annexed are true copies of documents in the file of the Bureau of Employees' Compensation, Federal Security Agency, relating to the case of Robert Willie Dillehay, Jr., deceased, former 3rd Assistant Engineer aboard "LT-221", North African Theatre of Operations, United States Army Transport Service, War

Department, (File No. X-93871). The originals of these copies are now on file with the Bureau of Employees' Compensation, Federal Security Agency, located at 4th and Independence Avenue, N. W., Washington, D. C.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Security Agency to be affixed this 7th day of October 1948.

By direction of the Federal Security Administrator.

(s/d) L. W. O'HEARN,
Acting Executive Assistant.

* * * * * * *

Federal Security Agency

BUREAU OF EMPLOYEES' COMPENSATION

Case No. X-93871

In the matter of the claim for compensation under the U. S. Employees' Compensation Act of September 7, 1916, as amended, of ELEANOR B. DILLEHAY, widow, and DORIS ANN DILLEHAY, minor daughter, Claimants.

On account of the death of ROBERT WILLIE DILLEHAY, JR., Decedent.

War Department (New Orleans Port of Embarkation) Reporting Establishment

FINDING OF FACTS AND AMENDED COMPENSATION ORDER

The above named decedent drowned on October 15, 1944, in the North African Theater of Operations, while in the performance of duty as an employee of the War Department, Transportation Corps, aboard the USAT LT-221, and Finding of Facts and award was filed on April 3, 1946 awarding compensation to Eleanor B. Dillehay as the natural guardian of Doris Ann Dillehay, decedent's daughter, at the rate of 10% of the maxi-

mum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or if over eighteen and incapable of self-support, until becoming capable of self-support. Additional investigation in respect to the above entitled claim having been made as is considered necessary, and after consideration of such claim and additional evidence of record, the Bureau makes the following

FINDING OF FACTS

That Eleanor B. Dillehay remarried on February 14, 1946; that the compensation otherwise payable to Eleanor B. Dillehay on her own account from October 16, 1944 to February 13, 1946, inclusive, is less than the war risk insurance which she received from the War Shipping Administration; that she will at no time be eligible to receive compensation on her own account as a widow.

Upon the foregoing finding of facts it is ordered that the aforementioned award be and the same is hereby modified and compensation commencing February 14, 1946 be paid to Eleanor D. McNamee as the natural guardian of Doris Ann Dillehay, decedent's daughter, subject to modification in accordance with section 10 of the Act as follows:

Doris Ann Dillehay, daughter, 25% of the maximum wage, $175.00, or $43.75 per month until she dies, marries, reaches the age of eighteen, or if over eighteen and incapable of self-support, becomes capable of self-support.

Given under my hand at New York, New York, this 2nd day of February, 1947.

WM. MCCAULEY,
Director,
Bureau of Employees' Compensation.

WJH: tr. January 31, 1947.

* * * * * * *

Findings of Fact and Award in the Case of Robert Willie Dillehay, Jr., File No. X-93871

The Commission, having considered the evidence submitted in the claim for the benefits of the U. S. Employees' Compensation Act of September 7, 1916, on account of the death of Robert Willie Dillehay, Jr., makes the following

Findings of Fact

That Robert Willie Dillehay, Jr., aged 22, a civil employee of the United States Government, employed by the War Department, Transportation Corps, New Orleans Port of Embarkation, as a 3rd Assistant Engineer aboard the USAT LT 221, was lost at sea on October 15, 1944, in the explosion and sinking of the tug;

that he was in the performance of duty at the time he was reported missing;

that there is a Report of Death from the Adjutant General's Office on file;

that the rate of pay of the decedent was $2200.00 per annum, plus subsistence and quarters valued at $540.00 per annum, plus a bonus of $183.33, or a monthly wage of $411.66, for the purposes of computing compensation;

that a claim for compensation on account of the death, on Form CA 5, was received in this office on May 3, 1945, within one year of the death, filed by Eleanor B. Dillehay, born November 11, 1921, as the widow of the decedent, on her own behalf, and on behalf of Doris Ann Dillehay, born February 13, 1943, the minor daughter of the decedent;

that Eleanor B. Dillehay is the widow of the decedent and was living with him at the time of death within the meaning of the Act;

that Doris Ann Dillehay is the minor daughter of the decedent;

that there was on the decedent's life a war risk insurance policy in the amount of $5500.00 under which Eleanor B. Dillehay, widow of the decedent, was the designated beneficiary;

that Eleanor B. Dillehay, widow of the decedent, has received the $5500.00 war risk benefit and will not be eligible to receive compensation on her own account until the amount otherwise payable exceeds the proceeds of the war risk insurance benefits which she received;

that Doris Ann Dillehay received no benefits of the war risk insurance;

that in consideration of an award made to Eleanor B. Dillehay as the natural guardian, on behalf of the minor daughter of herself and the decedent, she executed before a notary public and submitted a release of all demands against the United States of America and all its departments and agents, which is now on file.

Upon the foregoing facts the Commission makes the following

AWARD

Compensation for the death of the said Robert Willie Dillehay, Jr., shall be paid to the widow on behalf of the minor daughter of the decedent, subject to modification in accordance with the provisions of Section 10 of the Act as follows:

Doris Ann Dillehay, daughter, 10% of the maximum wage rate, $175.00, or $17.50 per month, until death, marriage, or reaching the age of eighteen, or, if over eighteen and incapable of self-support on account of some mental or physical disability, until becoming capable of self-support.

Given under our hands at New York, New York, this 3rd day of April, 1946.

——— ———,
Chairman,

ALBERT H. LADNER, JR.,
Commissioner,

HATTIE W. CARAWAY,
Commissioner.

Attest:

WM. MCCAULEY,
Secretary.

WJH:tr 3/28/46

* * * * * * *

Release executed by Eleanor B. Dellehay, dated February 12, 1946.

RECEIVED FROM the United States of America an award of Seventeen and 50/100 Dollars ($17.50) per month on account of my child, Doris Ann Dillehay, and the child of Robert Willie Dillehay, Jr., commencing October 16, 1944, under Section 10 of the Public Law 267, 64th Congress, approved September 7, 1916, as amended, to continue until the child dies, marries, or reaches the age of eighteen, or if over eighteen and incapable of self-support on account of some physical or mental disability, until she becomes capable of self-support, in consideration for which I hereby release the United States of America, all departments, agents, agencies, and instrumentalities thereof, the War Shipping Administration, the United States Maritime Commission, their successors and assigns, and their several vessels and those who are

r were the owners, agents, charterers, masters, offi-
ers and crews of said vessels, of each and every right
r claim which I now have or may hereafter have be-
ause of any matter or thing which happened before
he signing of this paper; and particularly, but not in
imitation of any of the foregoing general terms, of
nd from all claims arising out of or in any way con-
ected with the death of my late husband, Robert
Willie Dillehay, Jr., while he was serving as a mem-
er of the crew of the USAT LT-221.

IN WITNESS WHEREOF I have hereunto set my hand
nd seal this 12 day of February, 1946.

ELEANOR B. DILLEHAY.

TATE OF TENNESSEE
County of Shelby
City of Memphis

On the 12th day of February, 1946, personally ap-
eared the above named Eleanor B. Dillehay, known
o me to be the person whose signature appears next
bove, and acknowledged the free and voluntary exe-
ution of the above release with full appreciation of
s effect.

EDITH JACKSON,
Notary Public.

My Commission Expires Oct. 17, 1948

IBT:tr

* * * * * * *

June 15, 1945.

Mrs. Eleanor Dillehay
967 Maxey Street
Memphis, Tennessee

Dear Madam:

The War Department has notified this Commission that Robert W. Dillehay died as a result of a war risk while in the performance of duty as a civil employee of the Army Transport Service.

This Commission under the United States Employees' Compensation Act of September 7, 1916, may pay compensation for such death to the persons indicated below:

(a) The widow who was living with or dependent for support upon the deceased employee at the time of his death.
(b) The unmarried children under 18, and those over 18 who are incapable of self-support.
(c) Parents partially or wholly dependent upon the deceased employee for support.
(d) Unmarried brothers, sisters, or grandchildren under 18 years of age, and those over 18 who are incapable of self-support, and who were wholly or partially dependent upon the deceased employee.
(e) Grandparents wholly or partially dependent upon the deceased employee.

If a valid claim is established by you compensation would be payable at a rate not to exceed $61.25 per month on account of yourself as widow, and at a rate not to exceed $17.50 per month on account of the child.

The Division of Wartime Insurance, War Shipping Administration, 99 John Sreet, New York 7, New York, has informed the Commission that the above named

seaman designated you as his beneficiary for the proceeds of $5500.00 war risk benefit provided by the Army Transport Service.

Your right to benefits under the Compensation law and under the war risk benefit plan and the procedure you should follow to obtain such benefits is explained below. It should not be necessary for you to employ the services of an attorney to obtain such benefits. If you do not understand any part of the plan described herein please write to the Commission for further advice.

Benefits under the Federal Employees' Compensation Law.

If you establish a valid claim under the law as a widow of the deceased employee by submitting proof of a valid marriage you would be entitled to receive compensation at a rate not to exceed $61.25 per month until your death or marriage. Inasmuch as there is a surviving child of the decedent you would also be entitled to an amount not exceeding $17.50 per month additional for that child until she reaches 18 years of age or marries. Compensation on account of the child may be paid after the child reaches 18 years if she is physically or mentally incapable of self-support. Compensation under the law would be paid to you in regular instalments on the first and sixteenth of each month.

Inasmuch as you have already filed a claim, Form CA-5, together with proof of marriage and birth certificate of the child of the deceased with the United States Employees' Compensation Commission, it will not be necessary to re-submit these documents. Should you desire to receive compensation as widow for yourself and child, or compensation only for the child you should so notify the United States Employees' Compensation

Commission, 285 Madison Avenue, New York 17, New York, by letter.

The benefits described above would be paid immediately after receipt and approval of your claim *unless* you should apply for and receive the war risk benefit described below. In the latter event you would not receive instalment payments of compensation as widow until approximately April 15, 1952, and then only if you have not remarried. (However, acceptance of the war risk benefit would not affect immediate payment of compensation on account of your child.) Read carefully the paragraphs below relating to the war risk benefit.

WAR RISK BENEFIT

The Army Transport Service has arranged with the War Shipping Administration to provide war risk benefit payment for death of a seaman caused by a war risk. In your case such benefit is $5500 and you have been designated the beneficiary and are therefore entitled to such payment in a lump sum upon proof of valid claim made to the War Shipping Administration. Enclosed is letter addressed to the Chief Adjuster, Division of Wartime Insurance, War Shipping Administration, 99 John Street, New York 7, New York, together with questionnaire, both of which are marked form B. You should fill out the questionnaire in accordance with instructions on the last page of the questionnaire and sign the letter, and then mail the same to the Chief Adjuster. Provision has been made in the letter for you to indicate whether or not you claim the war risk benefit. *The questionnaire should be completed by you and forwarded to the Chief Adjuster regardless of whether you claim the war risk benefit.*

When certified copies of documents such as marriage certificates, birth certificates, etc., are furnished with

claim for compensation they need not be furnished with the claim for the war risk benefit. If such certificates are submitted with claim for the war risk benefit they need not be furnished with the claim for compensation. Appropriate reference should be made to the claim with which the certificates were furnished.

Effect of Acceptance of War Risk Benefit

If you claim and receive the war risk benefit in a lump sum the amount so paid to you by the War Shipping Administration will be offset against compensation otherwise payable to you under the Compensation law. No compensation could be paid to you until the amount of such accrued compensation equals the amount of the benefit you have received from the War Shipping Administration. This offset applies only against the compensation otherwise payable to the person named as beneficiary under the war risk benefit plan. In case the war risk benefit is paid to the estate of the deceased seaman and a claimant for compensation receives a share of the war risk benefit through distribution of such estate, the amount actually received by such claimant shall be offset against the compensation that would otherwise be paid.

Effect of Acceptance of Compensation Benefits

If you claim and receive compensation under an award made by the Commission in accordance with the provisions of the Federal Employees' Compensation Law, the amount so paid to you will be offset against the benefits otherwise payable to you under the war risk benefit plan. No war risk benefit will be paid to you by the War Shipping Administration while you are receiving compensation and you will be required to sign a release of your rights to the war risk benefit in the

amount received by you as compensation from the Commission.

Very truly yours,

C. R. MIDDLETON,
Chief of Section.

WJH:glf
Official copy to:

Chief Adjuster, Division of Wartime Insurance
War Shipping Administration, 99 John Street,
New York 7, New York

The Chief, Officer of the Chief of Transportation
War Department, Washington, D. C.
Att: Colonel R. M. Hicks, Chief, Water Division

The Commanding General, New Orleans Port of Embarkation
Army Transport Service, Poland & Dauphine Streets
New Orleans 12, La.
Att: Port Civilian Personnel Officer.

* * * * * * *

[Title of Court and Cause]

LIBELLANT'S ANSWER TO RESPONDENT'S MOTION FOR REHEARING

[Endorsed: Filed October 27, 1950]

1. Denied. On the contrary, it is averred that libellant instituted the within suit under the Suits in Admiralty Act, the Public Vessels Act, and general maritime law. It is admitted that excepted allegations were filed by the respondent challenging the jurisdiction of this Court and asserting the affirmative defense that the Federal Employees' Compensation Act is the exclu-

sive remedy in this case. It is further averred that respondent's Exceptions to the Libel and the excepted allegations were argued before the Honorable James P. McGranery and that these exceptions were overruled by the Court: *Mandel vs. United States,* E.D.Pa., 74 F. Supp. 754.

2. Denied. On the contrary, it is averred that the jurisdiction of this Court and the alleged bar and exclusive remedy of the Federal Employees' Compensation Act were determined by Judge James P. McGranery in *Mandel vs. United States,* supra.

3. Denied. On the contrary, it is averred that the jurisdiction of this Court has already been determined in *Mandel vs. United States,* supra, and that that opinion is the law of this case.

4. Denied.

5. Denied. On the contrary, it is averred that respondent's claim of privilege and the fact that the Tug LT-221 was operated by the United States Army Transportation Corps and all other facts set forth in the affidavits of Colonel Ralph R. Sears and Alexander Corey were before the Court and considered by this Court in connection with the opinion filed by your Honor on August 14, 1950.

6. Denied. It is admitted that this Court must determine the form of decree to be entered herein.

WHEREFORE, libellant prays that the petition for rehearing be denied.

FREEDMAN, LANDY AND LORRY,
(Sd.) By WILLIAM M. ALPER,
Proctors for libellant.

[Title of Court and Cause]

ORDER OF DISTRICT COURT, DENYING RESPONDENT'S MOTION FOR REHEARING

[Endorsed: Filed November 1, 1950]

ORDER

AND NOW, to wit, this 30th day of October, 1950, argument having been made on the Motion for Rehearing in connection with the opinion dated August 14, 1950, requiring production of documents, and due consideration having been given thereto, the Motion for Rehearing is hereby denied.

KIRKPATRICK,
U.S.D.J.

[Title of Court and Cause]

ORDER OF DISTRICT COURT FILED NOVEMBER 1, 1950, REQUIRING RESPONDENT TO PRODUCE NOTES OF TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION EXCEPT FOR STATEMENTS OF THE MASTER OF THE LT-221

[Endorsed: Filed November 1, 1950]

ORDER

AND NOW, to wit, this 30th day of October 1950, in accordance with the opinion filed August 14, 1950, it is hereby

ORDERED that the respondent produce the notes of testimony of all witnesses taken in connection with the Army Board of Investigation into the sinking of the Tug LT-221, and any statements taken therein excepting the notes of testimony or statements taken from the

Master for inspection and copying by the libellant within twenty days from the date of this order.

KIRKPATRICK,
U.S.D.J.

[Title of Court and Cause]

LIBELANT'S AFFIDAVIT RE PRODUCTION OF MASTER'S TESTIMONY BEFORE ARMY BOARD OF INVESTIGATION

[Endorsed: Filed November 3, 1950]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

WILLIAM M. ALPER, being duly sworn according to law deposes and states that he is a member of the firm of Freedman, Landy and Lorry, counsel for the within libellant; that on October 25, 1950 libellant filed an affidavit relating to his efforts to obtain a statement from Captain Ernest A. Hambacher; that your affiant erroneously stated in the aforesaid affidavit that he was unable to obtain authorization from the United States Army to discuss this case with Hambacher; that subsequent to that time your affiant discovered a letter which had inadvertently been misplaced in libellant's file and which had been addressed to libellant's counsel by the War Department on March 10, 1947, a true and correct copy of which is attached hereto and marked Exhibit "A".

WILLIAM M. ALPER.

Sworn to and subscribed before me this 1st day of November, 1950.

(Sd.) JESSIE D. VALENTI,
Notary Public.

My Commission Expires Jan. 4, 1953.

EXHIBIT "A"

WAR DEPARTMENT

Office of the Judge Advocate General
Washington 25, D. C.

JAGL 1946/9683

10 Mar 1947

Messrs. Freedman, Landy and Lorry
906 Jefferson Building
1015 Chestnut Street
Philadelphia 7, Pennsylvania

Gentlemen:

Your letter of 6 January 1947 addressed to the Office of The Adjutant General, wherein you request permission to have Mr. Ernest A. Hambacher, master of the United States Army Tug LT-221, and a civilian employee of the United States Army at the time of the sinking of said vessel, testify in behalf of your client in the action brought by the Estate of Robert W. Dillehay, Jr., Deceased, against the United States, has been referred to this office for reply.

The third paragraph of your aforementioned letter indicates that you desire to have Mr. Hambacher testify concerning the events leading to the sinking of the above-mentioned vessel outside the Port of Cagliari, Sardinia, on 15 October 1944. The War Department has no objection to Mr. Hambacher testifying concerning any material facts relative to the sinking of the above vessel, inasmuch as the former need for secrecy of such information no longer exists.

Sincerely yours,

(S.) W. P. CONNALLY, JR.,
Colonel, JAGD,
Acting Assistant Judge Advocate General.

[Title of Court and Cause]

LIBELLANT'S MOTION FOR JUDGMENT BECAUSE OF RESPONDENT'S FAILURE AND REFUSAL TO PRODUCE DOCUMENTS IN VIOLATION OF AN ORDER OF COURT

[Endorsed: Filed December 11, 1950]

To the Honorable, the Judges of the United States District Court:

Libellant, by his counsel, Messrs. Freedman, Landy and Lorry moves your Honorable Court for an order entering judgment against the respondent and in favor of the libellant for the following reasons:

1. This action was brought to recover damages for the wrongful death of a member of the crew of a tugboat operated by the respondent, who was killed in the course of a disaster when the tugboat encountered one or more mines at or near the port of Cagliari, Sardinia.

2. Following this marine disaster, a number of hearings were conducted by the United States Army Board of Investigation, and sworn statements and testimony were rendered by various witnesses regarding the cause and other circumstances of the explosion and foundering of the vessel.

3. In order to properly prepare for trial, libellant sought production of the statements and testimony rendered in the foregoing hearings under Admiralty Rule 32, to which application respondent filed exceptions.

4. After due hearing and argument by the respective parties, this Court rendered an opinion on August 14, 1950, holding that the respondent was required to produce all of the statements and notes of testimony, excepting those rendered by the Master.

5. After the opinion of the District Judge was filed,

respondent moved for a rehearing which, after further argument, was denied by the Court.

6. On October 30, 1950, this Court entered an order in accordance with the opinion filed on August 14, 1950, directing that the documents referred to be produced within twenty days from the date of the order.

7. Respondent, by its counsel, replied to the Court that it would refuse to produce the required documents, and has now failed and refused to produce the said documents within the period of twenty days as required by the Order of Court.

8. Libellant alleges that the documents referred to contain relevant and important facts concerning the liability of the respondent for the death of the decedent in this case, which information has not been heretofore disclosed in the answers to interrogatories. It is therefore averred that the respondent's refusal to produce the documents required under the Order of Court is most prejudicial to the libellant.

WHEREFORE, libellant prays your Honorable Court for an order pursuant to Admiralty Rule 32C entering judgment in favor of the libellant, and that the case proceed to trial solely on the question of damages.

FREEDMAN, LANDY AND LORRY,
By
WILLIAM M. ALPER,
Proctors for Libellant.

[Title of Court and Cause]

TRANSCRIPT OF HEARING ON MOTION FOR JUDGMENT HELD DECEMBER 11, 1950

Philadelphia, Pa., December 11, 1950

[Endorsed: Filed January 4, 1951]

Before HONORABLE WILLIAM H. KIRKPATRICK, *J.*
(In Chambers)

Present: *Freedman, Landy & Lorry, Esqs.*, by *Abraham E. Freedman, Esq.*, and *William M. Alper, Esq.*, representing the Libellant.

James P. McCormick, Esq., Assistant United States Attorney, By *Patrick F. Cooney, Esq.*, representing the Respondent.

Mr. COONEY: The Respondent in this case has throughout, first, by filing excepting allegations, second, in its answer to the libel, third, its motion for rehearing in connection with the discovery proceedings, contended as a defense that the exclusive remedy on account of the death of Robert Willie Dillehay is compensation rights under the United States Employees Compensation Act.

In connection with previous hearings we have, on record, affidavits from the Army Transportation Corps showing the nature of the vessel, and properly certified records of the Bureau of Employees Compensation relative to this case.

At this time I would like to offer in evidence, to supplement those previous documents, the certified records of the General Accounting Office setting forth the payments of compensation made by the United States on account of the death of Robert Willie Dillehay.

(The documents were produced by Mr. Cooney.)

Mr. FREEDMAN: Well, sir, we object to it, Your Honor, because this issue was brought up before Judge McGranery quite some time ago, passed upon by him, and their contention was denied then.

The only issue which is now before Your Honor is the failure of the Respondent here—

THE COURT: Yes, that is what I was going to ask. Isn't the only question here whether the United States has forfeited its right to defend by failing to produce certain evidence in response to an order of Court?

Mr. FREEDMAN: Exactly, sir.

THE COURT: Even if they have such a right they would have to assert it at the trial, and inasmuch as they have incurred the penalty which the Court ordered, I don't believe it is even before me at the present time.

Isn't that the situation?

Mr. FREEDMAN: That is the way we feel about it.

THE COURT: They may have a number of defenses, but if they don't produce, in response to the Court's order, they forfeit all the defenses that they may have by the entry of judgment.

(Off record discussion)

THE COURT: Well, all right, then I will sustain the objection to the offer and proceed to enter judgment.

Mr. COONEY: In that case, Your Honor, we would like to have these marked for identification.

THE COURT: Oh, yes, all right.

Mr. COONEY: Because, as we have contended, these are separate and independent defenses, other than the negligence.

(Certified copies of documents on file in the General Accounting Office in the case of Mrs. Eleanor B. Dillehay and Mrs. Eleanor D. McNamee were marked as Respondent's Exhibit 1 for identification, 12/11/50.

Certified copies of documents on file in the General

Accounting Office in the case of Mrs. Eleanor D. McNamee were marked as Respondent's Exhibit 2 for identification, 12/11/50.)

THE COURT: All right.

Well, I haven't done any more than just barred them from the negligence question. This is an entry of judgment.

Mr. FREEDMAN: That is the way—

THE COURT: I mean, in the Alltmont case all I did was to prevent them from offering evidence to disprove negligence. In this case there is a general entry of judgment on possible defenses, which is within the power of the Court.

Mr. FREEDMAN: Well, once you enter judgment—

THE COURT: It is a question of which penalty you select.

Mr. FREEDMAN: Well, in the Alltmont case there was a more practical effect. It was pretty much the same—

THE COURT: Well, it wasn't quite the same, because in the Alltmont case there still was the defense that they could have made that it was a normal risk of wartime and that there was no liability for negligence under war conditions. I think they had that defense still to make. That was the reason in the Alltmont case, as I remember, that I confined it to the limitation of their right to disprove negligence, but here the matter is in the full discretion of the Court as to what the penalty to be assessed is, and if the Court feels it proper it can enter a general judgment, which is what I am doing here.

Mr. FREEDMAN: Well, Judge, may I ask that you strike out of the record all reference to the Alltmont case, because that is still pending and in the event there is any question about it—

Oh, well, no, the judgment—

THE COURT: It doesn't make any difference.

Mr. Freedman: That is right.
The Court: All right, here it is.

[Title of Court and Cause]

Interlocutory Decree Entered December 11, 1950

[Endorsed: Filed December 11, 1950]

Interlocutory Decree

And now, to wit this 11th day of December, 1950, it is

Ordered, Adjudged and Decreed that judgment be and hereby is entered in favor of the libellant and against the respondent and that the case proceed to trial solely on the question of damages.

Kirkpatrick,
U. S. D. J.

[Title of Court and Cause]

NOTICE OF APPEAL AND ORDER ALLOWING APPEAL

[Endorsed: Filed December 20, 1950]

Please take notice that the United States of America, respondent in the above entitled cause hereby appeals to the United States Court of Appeals for the Third Circuit from the Interlocutory Decree of this court entered herein on December 11, 1950, ordering, adjudging and decreeing that judgment be entered in favor of the libellant and against the respondent and that the case proceed to trial solely on the question of damages.

GERALD A. GLEESON,
United States Attorney,
Proctor for Respondent,
U. S. Courthouse, 9th &
Market Sts. Phila., Pa.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

KIRKPATRICK,
U. S. D. J.

Dated: December 20, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951

[fol. 100] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,385

SAMUEL MANDEL, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased

v.

UNITED STATES OF AMERICA, Appellant

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

Argued June 6, 1951

Before Goodrich and Kalodner, Circuit Judges and Marsh, District Judge

OPINION OF THE COURT—Filed August 16, 1951

By GOODRICH, Circuit Judge:

This appeal brings before the Court the question of the right of a civilian crew member of a ship owned and operated by the United States to sue the government for injuries received in the course of his employment.

October 8, 1946 a libel was filed by the administrator of the estate of Robert Dillehay, Jr. against the United States of America seeking damages in behalf of deceased's widow and child. It alleged that on October 15, 1944 Dillehay was employed by the United States as a civilian officer of the tug LT-221, that the vessel hit a mine off Sardinia and sank, [fol. 101] causing the death of Dillehay and that the explosion resulted from improper equipment or from careless navigation of the vessel. The government filed exceptions to the libel moving, inter alia, that it be dismissed on the ground that the tug was a public vessel and that deceased was entitled to compensation under the Federal Employees' Compensation Act, 5 U. S. C. A. § 751 et seq., and that this remedy precluded suit under the Public Vessels Act, 46 U. S. C. A. § 781.

The District Court [1] concluded that the action was main-

[1] 74 F. Supp. 754 (E. D. Pa. 1947).

tainable under either the Public Vessels Act or the Suits in Admiralty Act,[2] and found it unnecessary to decide whether the tug LT-221 was a merchant or public vessel.

The United States thereafter answered, denying negligence, and reasserting its defense of immunity from suit. In due course libellant served interrogatories on the United States which were answered by it. Finally, a motion under Admiralty Rule 32 for production of a report by the Army Board of Investigation regarding the sinking of the tug LT-221 was made by libellant before Chief Judge Kirkpatrick. The court granted the motion on August 14, 1950.[3] A petition for rehearing was then filed, along with a writing signed by the Secretary of the Army, called a "claim of privilege," stating that the report was confidential and declining to permit its production. Judge Kirkpatrick refused a rehearing by order dated November 1, 1950. December 11, 1950 judgment was entered against the government for failure to comply with the order to produce the documents and it was ordered that the case proceed to trial solely on the question of damages. From this order the United States appeals.[4]

The appellee suggests that no question is before us on this appeal except that of privilege by the Secretary of the [fol. 102] Army to refuse to release information which he regards it important to keep secret. The refusal to recognize the claimed privilege was the basis of the District Court's entry of judgment, it is said, and the points on appeal must be confined to the propriety of that order. Appellee's counsel admits readily, however, that he would like to see the broader question of liability passed upon.

We think that the question of liability of the United States under the statutes relied on is before us at this time. Since the case is, as already indicated, properly in this Court on appeal, we think the appeal is as broad as any questions raised by the appellant on the record as it now exists. The reason is analogous to the rule which requires a plaintiff not to split his causes of action at the pain of being pre-

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[2] 46 U. S. C. A. § 741 et seq.

[3] 93 F. Supp. 692 (E. D. Pa. 1950).

[4] This is an interlocutory order from which an appeal is allowed under 28 U. S. C. A. § 1292(3).

cluded from further suit when one segment has been split off and decided.[5] Permitting an interlocutory appeal is an exception to the general rule of the federal statutes that appeals may be had only from final judgments. The exception certainly does not go so far as to permit multiple appeals where they may be avoided. We think it both good law and good sense that we should consider at this stage the fundamental point made by the United States, namely that it is not liable at all to this plaintiff.

It is true that the District Court entered judgment in favor of the libellant and against the United States because of the latter's refusal to produce a given document or record.[6] While from one point of view that action is in the nature of a penalty, the wider question is whether the United States is liable to suit at all. If it is not, it is not at fault in failing [fol. 103] to produce what, in that event, is an irrelevant document. We proceed, then, to the broader question.

We have in this case the not unusual situation of a problem arising under a statute to which the statute itself gives no answer. It is clear that if the vessel on which officer Dillehay was employed was a "public vessel" his widow and child are entitled to compensation as provided in the federal statute.[7] But there was nothing in the federal compensation law in 1944 which said expressly that if one is entitled to compensation that was the only remedy

[5] Restatement, Judgments § 62 (1942).

[6] Such action is authorized by Admiralty Rule 32C(b)(2)(iii). This rule is identical with Rule 37(b)(2)(iii) of the Rules of Civil Procedure. The entry of a default judgment under the latter has been held not to preclude inquiry by the Court of Appeals into the jurisdiction of the District Court. Michigan Window Cleaning Co. v. Martino, 173 F. 2d 466 (6th Cir. 1949). Cf. Fenton v. Walling, 139 F. 2d 608 (9th Cir. 1943). Sovereign immunity is a jurisdictional matter. See Nassau Smelting Works, Ltd. v. United States, 266 U. S. 101, 106 (1924); Minnesota v. United States, 305 U. S. 382, 389 (1939); Restatement, Judgments §§ 5, comment k and 9, comment b (1942).

Compare, also, Fed. R. Civ. Proc. 55(e).

[7] 5 U. S. C. A. § 751 et seq.

he could have.[8] On the other hand, there is nothing expressly said in the Public Vessels Act or the Suits in Admiralty Act that a man injured under the circumstances set out in the plaintiff's libel may or may not sue. Furthermore, the only help counsel have been able to give us on the matter of legislative history is argumentative conclusion from the fact that such and such was done. We are told what Congress "must" have had in mind, but nothing in the way of committee report or anything authentic or convincing on the subject.

We are necessarily faced then with the general problem: May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained by the administrator of the decedent for the damages caused by his death. 46 U. S. C. A. § 761. We think there are several reasons why the Compensation Act should be held to be the exclusive measure of rights in this case.

[fol. 104] 1. The first reason is the analogy to the rule under Workmen's Compensation Acts which are now an accepted and almost universal part of state legislation. It is the general rule that unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable, at least so far as rights against the em-

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[8] In 1949 the Federal Employees' Compensation Act was expressly made exclusive. 63 Stat. 861, 5 U. S. C. A. § 757(b). The amendment contains the proviso, "* * * That this subsection shall not apply to a master or a member of the crew of any vessel." This amendment has no application to the case at bar, since the action was pending when the amendment became effective. See FECA Amendments of 1940, § 303(g), 63 Stat. 867, 5 U. S. C. A. § 757, note. Furthermore, what little legislative history is available indicates only that Congress did not wish to legislate affirmatively on the rights of seamen because no discussion of the problem had been had in committee. See Cong. Rec. 13,607-609 (1949). Johnson v. United States, 186 F. 2d 120, 124 (4th Cir. 1950).

ployer are concerned.[9] One must not generalize too widely from this rule because many of the statutes provide expressly that the remedy is exclusive.[10] Nevertheless, we think the general rule represents the crystallization of the thought of both law makers and courts upon the subject. The Compensation Acts are intended to provide a more humane, adequate and generally fair method of dealing with accidents incurred by employees in the course of employment than the former common-law rules of employers' liability. They are intended to do away with prolonged and expensive litigation with hard cases going uncompensated because of inability to show fault on the part of the employer. We think that in general the natural inference would be that the Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages.

2. The reliance on the Compensation Act alone will remove an element of unfairness otherwise present in the type of case represented here. The typical make-up of the personnel of public vessels is a crew of employees some of whom are in the armed forces, some of whom are civilians. They are all said to be subject to the same discipline while engaged in the particular voyage,[11] although the civilians have the privilege of terminating their service in a fashion [fol. 105] more convenient to themselves than is open to members of the armed forces. Those members of the armed forces injured while on active duty have such compensation and only such compensation as Congress has provided by

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[9] Prosser, Torts, p. 543 (1941); Schneider, Workmen's Compensation Law, §§ 89-154 (1941).

[10] The absence of a provision declaring the FECA exclusive is not helpful as an indication of Congressional intent. At the time of its passage there were no statutes permitting suit against the government. Note, however, that the Shipping Act of 1916, 39 Stat. 728 (1916), the first of such acts, was passed the same day as the FECA.

[11] 10 U. S. C. A. § 1473(d). Cf. In re Berue, 54 F. Supp. 252 (S. D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943).

the military pension and compensation laws.[12] We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate.[13]

3. We find weight in the government's argument that it would not be in the public interest to have judicial review of the question of negligence in the conduct of military, or semi-military, operations. The operation of ships or land forces in the presence of the enemy is a matter where judgments frequently have to be made quickly and where judgments so made by commanding officers must have prompt and immediate response. It will not, we think, aid in the operation of the armed forces if the propriety of a commander's judgment is to be tested months or years afterwards by a court or a court and jury. What, in the light of subsequent events, may appear to be a lack of caution may have been the very thing necessary, or apparently necessary, at the time the action was taken.

This point is sharply emphasized by examination of the various allegations of negligence set out in the libel. Among others it charges the following:

> (b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;
> [fol. 106] (d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;

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[12] Bradey v. United States, 151 F. 2d 742 (2d Cir. 1945), cert. den. 326 U. S. 795 (1946), reh. den. 328 U. S. 880 (1946); Dobson v. United States, 27 F. 2d 807 (2d Cir. 1928), cert. den. 278 U. S. 653 (1929). Cf. Feres v. United States, 340 U. S. 135 (1950) (Tort Claims Act).

[13] It would also discriminate against civilian seamen employed by the United States through the War Shipping Administration who are authorized to sue the United States for the tort but are excluded from the FECA by the War Shipping Administration (Clarification) Act of 1943, 50 U. S. C. A. App. § 1291.

(h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances;

We do not think that examination of such questions with a view to determining negligence of an officer in a combat zone is a suitable subject for court review. Suppose the injuries were sustained in a large scale hurried evacuation comparable to Dunkirk, or an even larger scale invasion like that on the coast of Normandy. Court examination of the precautions taken for the safety of civilian employees on hospital ships, tugs and transports to determine whether due care to this plaintiff had been observed seems to us an incongruous subject for litigation.

Further, the production of evidence necessary in such an investigation in a public trial does not seem to us desirable from the standpoint of national defense. It is true that there is no longer armed conflict in the Italian theater, and there has not been for some time. But armed conflict in which we are involved goes on in other parts of the world. There are interests unfriendly to the United States which would be willing enough to learn anything possible about the way our operations are or were carried on. We have no lack of confidence in the discretion or integrity of our trial courts. But that is not the point. No judge has it as part of his task to act as an intelligence officer for the armed forces. He cannot tell how the facts developed out of one incident, seemingly isolated and unimportant, may fit into a larger picture worked upon by an active and skilled hostile espionage system. We do not think he should be called upon to pass upon such a question.

In our view, therefore, the considerations point to the conclusion that the rights of the parties involved in this litigation are such rights as the Federal Employees' Compensation Act gives them and no more.

[fol. 107] As would be expected in such a difficult and close question as this one is, we do not find the authorities speaking with unanimity. The very question before us has been presented and thoughtfully considered in the Fourth Cir-

cuit. Johnson v. United States, 186 F. 2d 120 (1950).[14] It is hardly necessary to add that we disagree with diffidence from a conclusion that Circuit reaches. But since we do reach a different conclusion it is our business to say so and we do. The other authorities relevant to the subject are as follows:

The Supreme Court has held that the Public Vessels Act permits suit for personal injury as well as property damage; American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947), and for injuries caused by the crew as well as the vessel itself, Canadian Aviator, Ltd. v. United States, 324 U. S. 215 (1945). It has held also that claiming and accepting payments under the FECA bars suit against the United States under the Federal Control Act. Dahn v. Davis, 258 U. S. 421 (1922). See also Brady v. Roosevelt S. S. Co., 317 U. S. 575, 581 (1943); Militano v. United States, 156 F. 2d 599 (2d Cir. 1946) (Public Vessels Act); Parr v. United States, 172 F. 2d 462 (10th Cir. 1949) (Tort Claims Act). And recently the Supreme Court held that members of the military were not authorized by the broad language of the Tort Claims Act to sue the United States for injuries received on active duty, but were relegated to their compensation and pension remedies. Feres v. United States, 340 U. S. 135 (1950). Cf. Brooks v. United States, 337 U. S. 49 (1949).

The Fourth Circuit has held that the compensation remedy did not preclude suit by a United States customs inspector against the United States under the Suits in [fol. 108] Admiralty Act. United States v. Marine, 155 F. 2d 456 (1946); cf. The Culberson, 61 F. 2d 194 (3d Cir.

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[14] Accord: Henz v. United States, 1950 A. M. C. 714 (N. D. Cal. 1950). Cf. United States v. Loyola, 161 F. 2d 126 (9th Cir. 1947) (libel dismissed on merits); Gibbs v. United States, 94 F. Supp. 586 (N. D. Cal. 1950) (election barred recovery); Sims v. United States, 1950 A. M. C. 714 (N. D. Cal. 1950) (maintenance and cure); Jentry v. United States, 73 F. Supp. 899 (S. D. Cal. 1947) (back wages). Contra: Lopez v. United States, 59 F. Supp. 831 (S. D. N. Y. 1944).

1932).[15] The Second Circuit has twice concluded that the military components of the crew of public vessels cannot sue under the Public Vessels Act. Bradey v. United States [16] and Dobson v. United States, supra. O'Neal v. United States, 11 F. 2d 869, aff'd 11 F. 2d 871 (2d Cir. 1926), held that the Public Vessels Act did not authorize suit by a member of the crew of a coast guard ship, but the decision was based partly on the theory, since rejected by the Supreme Court in the Canadian Aviator case, that the Public Vessels Act covered only damages caused by the vessel itself.

Further analysis of these decisions seems not to be useful. We are in square conflict with the Fourth Circuit decision and the view expressed by our confreres in the Ninth Circuit.[17, 18] If the considerations advanced above are correct, our conclusion follows.

The question whether the vessel involved in the accident out of which this litigation grows was a public vessel was

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[15] In many cases suit against the United States by a crew member of a government-owned merchant vessel has been permitted without discussion of the FECA. See, e. g. Krey v. United States, 123 F. 2d 1008 (2d Cir. 1941); Sevin v. Inland Waterways Corp., 88 F. 2d 988 (5th Cir. 1937); Stewart v. United States, 25 F. 2d 869 (E. D. La. 1928). See Gibbs v. United States, 94 F. Supp. 586, 589 n. 9 (N. D. Cal. 1950).

[16] In that case it was stated that: "* * * Congress did not expect those in its service upon 'public vessels' to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries." 151 F. 2d 742, 743 (2d Cir. 1945).

[17] United States v. Loyola, 161 F. 2d 126 (9th Cir. 1947). The libel seeking damages for failure to provide maintenance and cure was dismissed on the merits.

[18] Since this opinion was written the Second Circuit has decided the case of Johansen v. United States, — F. 2d — (July 30, 1951). The majority in that case agree with the point of view we have endeavored to express and disagree with Johnson v. United States, 186 F. 2d 120 (4th Cir.).

passed upon by the District Court. There is general allegation that it was a public vessel, and there are allegations of fact and affidavits which tend to support the public vessel conclusion, but no proof was heard. If the libellant desires to prove that the tug LT-221 was not a public vessel he should have that opportunity. If it is not, the case [fol. 109] presents lines of inquiry the extent of which need not be speculated upon at this time.

In view of our disposition of the case as discussed above, the question of privilege does not need to be passed upon.

The judgment of the District Court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true Copy. Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 110] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,385

SAMUEL MANDEL, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased

vs.

UNITED STATES OF AMERICA, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present. Goodrich and Kalodner, Circuit Judges, and Marsh, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this case be, and the same is hereby reversed and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

Ida O. Creskoff, Clerk.

August 16, 1951.

Received & Filed Aug. 16, 1951. Ida O. Creskoff, Clerk.

[fol. 111] I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief of Appellant and proceedings in this court in the case of Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., Deceased, vs. United States of America, Appellant, No. 10,385, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 10th day of September in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-sixth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 112] Supreme Court of the United States, October Term, 1951

No. 414

[Title omitted]

Order Allowing Certiorari—Filed January 2, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 40
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Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
on the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, Konrad G. Johansen, respectfully shows this Honorable Court:

I

Your petitioner filed a suit in admiralty in the United States District Court for the Southern District of New York, seeking to recover $25,000 damages for personal injuries sustained while he was employed by the government, as a civilian seaman, comprising part of the crew of the U. S. A. T. Kingsport Victory, a public vessel of the United States.

The libel alleged that on August 5, 1949, the petitioner, while working, was hit in the leg by falling lumber and was injured, because of the negligence of the respondent and the unseaworthiness of the vessel. The respondent's own exhibits show that at the time of this accident the vessel was at its pier in Brooklyn, New York, and was

not engaged in any military operation. Petitioner was admitted to a U. S. Marine Hospital that same day, where he received treatment until October 24, 1949, with two further weeks of disability thereafter, following the skin graft operation and other treatment which he received for his lacerated leg.

It was conceded by the Government in the Court below that petitioner was expressly informed by his superiors, acting on behalf of the United States, that he had no right to seek damages against the Government under the Public Vessels Act, but was told instead that his sole and exclusive right was to receive compensation benefits under the United States Employees' Compensation Act. Believing this information to be correct, and influenced by it, he duly made application for compensation benefits, and was awarded and paid $358.20, until his disability terminated on November 7, 1949, at which time he resumed his duties.

He then brought this suit. The District Court dismissed the suit, holding that when he was injured petitioner had a right to elect whether to sue the Government for damages or accept compensation benefits instead, but that by accepting the compensation benefits he had precluded himself from suing the Government for damages, even though his employer had misled him as to his rights (reported as *Johansen* v. *U. S.*, 1951 A. M. C. 117).

On appeal, the United States Court of Appeals for the Second Circuit held that a civilian seaman employed by the Government on a public vessel, although injured because of fault attributable to the United States, has no right of election; that such a person has no right to sue the Government for damages for personal injuries brought about by his employer's negligence or the vessel's unseaworthiness, and that his exclusive remedy would be to seek workmen's compensation benefits (reported as *Johansen v. U. S.*, 191 F. 2d 162 (C. A. 2nd, 1951)). Circuit Judge Chase wrote the majority opinion. Circuit Judge Frank wrote a dissenting opinion to the effect that such

a seaman has a right of election under the reasoning of *Johnson* v. *U. S.*, 186 F. 2d 120 (C. A. 4th, 1950), and since petitioner's superiors had erroneously led him to believe that his sole remedy was under the Compensation Act, petitioner never actually exercised his right of election, and therefore had a right to maintain this suit.

This petition is filed because the decision herein enunciates a doctrine which is in conflict with the decisions in

Johnson v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1950);
U. S. v. *Marine*, 155 F. (2d) 456 (C. A. 4th, 1946);
U. S. v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947).

It also involves an important question of Federal law as to which there is now a conflict between the Second and Third Circuits, on the one hand (see recent decision in *Mandel* v. *U. S.*, 191 F. (2d) 164 (C. A. 3rd, 1951)), and the Fourth and Ninth Circuits, on the other hand. This conflict has not been, but should be, squarely resolved and settled by this Court.

II

The jurisdiction of this Court rests on Section 1254(1) of Title 28 of the United States Code. The decision and judgment of the Court of Appeals in the instant case was rendered on July 30, 1951, and the final decree on mandate was entered on August 31, 1951.

III

Questions Presented

The majority opinion of the Court of Appeals succinctly stated the question presented as follows:

> "This appeal requires us to decide whether a civil employee of the United States who is employed as a member of a crew of an army transport may sue the

government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees' Compensation Act, 5 U. S. C. § 751 et seq."

Since the majority opinion came to the conclusion that petitioner's exclusive remedy lay under the Compensation Act, it did not decide whether payment to him of compensation benefits, when his employer had misinformed him concerning his rights, precluded him from bringing the suit for damages. The dissenting opinion decided these questions in favor of petitioner.

IV

Reasons for Allowance of Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

a) The decision of the Court of Appeals for the Second Circuit rendered in this case, and the more recent decision of the Court of Appeals for the Third Circuit in the case of *Mandel* v. *U. S.*, supra, are directly opposed to the decisions of the Court of Appeals for the Fourth Circuit in *Johnson* v. *U. S.*, supra, and *U. S.* v. *Marine*, supra, and the decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Loyola*, supra. See also recent decision in *McKenney* v. *U. S.*, 99 F. Supp. 121 (D. C. Cal., Aug. 1951).

The dissenting opinion of Circuit Judge Frank in the instant case expressly agrees with the rule as laid down in the Fourth Circuit in *Johnson* v. *U. S.*, supra, and holds that both the District Court and the Court of Appeals for the Second Circuit herein committed error in dismissing petitioner's libel.

There are at the present time pending in various United States courts an undetermined and large number of cases where this question is presented, and until this Honorable Court shall lay down an authoritative determination of this question there will continue to exist a conflict of authority, resulting in conflicting rulings in different parts of the United States, interpreting the same Federal law.

b) The issue present here involves an important question of Federal law which has not been, but should be, squarely settled by this Court.

V

For the reasons advanced herein, and in the brief supporting the application, your petitioner is advised and believes that the determinations of the United States Court of Appeals for the Fourth and Ninth Circuits properly interpret the laws involved and that the determination of the Court of Appeals for the Second Circuit in the instant case and that of the Third Circuit in the *Mandel* case are erroneous in holding that civilian seamen employed by the Government on public vessels have no right to elect to sue under the Public Vessels Act for damages for personal injuries resulting from negligence and/or unseaworthiness.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

KONRAD G. JOHANSEN,
Petitioner.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

WILLIAM L. STANDARD, being duly sworn, says that he is the attorney for Konrad G. Johansen, the petitioner herein; that he has read the said petition subscribed by him and that the facts therein stated are true to the best of his knowledge, information and belief.

WILLIAM L. STANDARD.

Sworn to before me this
25th day of October, 1951.

MALCOLM B. ROSOW,
Notary Public for the State of New York,
No. 41-3363275.
Qualified in Queens County.
Certs. filed with N. Y. & Richmond Co. Clks.
Cert. filed with Queens Reg.
Commission Expires March 30, 1953.

Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

POINT I

The Workmen's Compensation Statute did not provide an exclusive remedy.

The basic question here is whether the petitioner was entitled to sue the Government for damages under a tort liability act (The Public Vessels Act), or whether he was relegated to an exclusive remedy under the Federal Employees' Compensation Act. It thus becomes necessary to consider how the courts have interpreted both of these acts.

In 1926, the Public Vessels Act was adopted (46 U. S. C. section 741-749), giving a right to sue the Government for damages resulting from the fault of a public vessel of the United States. At first this was interpreted as referring to "damage physically done by a ship" (*O'Neal* v. *U. S.*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, 1925). That interpretation, however, was held to be too narrow a construction. In *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 65 Sup. Ct. 639 (1945), it was finally held that the

Public Vessels Act makes the Government liable to respond in damages for the negligence of its personnel, or the unseaworthiness of a public vessel, and that the Act is not limited to damage physically done by a ship.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366 (1946);
United States v. *Loyola,* 161 F. (2d) 126 (C. C. A. 9th, 1947);
Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Meanwhile, however, the Public Vessels Act was further construed as holding that it did not give a right to recover damages from the Government, for injuries sustained by military personnel in the line of active duty.

Brady v. *United States,* 151 F. (2d) 742 (C. C. A. 2d), cert. den. 326 U. S. 795, 66 Sup. Ct. 484, ref. den. 328 U. S. 880, 66 Sup. Ct. 1348 (1946);
Dobson v. *United States,* 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 Sup. Ct. 179 (1929).

This is similar to the interpretation recently given to the Federal Tort Claims Act, under which shore-side military personnel have similarly been held not entitled to sue the Government for damages for personal injuries sustained in the line of active duty (*Feres* v. *U. S.,* 340 U. S. 135, 71 Sup. Ct. 153 (1950)).

Thus the Public Vessels Act, like the Federal Tort Claims Act, recognized a distinction between suits by civilians, as compared with suits by members of the armed forces, injured in line of duty. Civilians were given the right to sue the Government for damages based on tort, while military personnel injured in line of duty, were denied such a right.

Since petitioner herein was a civilian, and since it appears clear from the foregoing authorities, that there is nothing in the Public Vessels Act to prevent him from recovering damages based on tort, we now turn to a consideration of the Federal Employees' Compensation Act.

Prior to the *Johansen* and *Mandel* cases, supra, the Federal Employees' Compensation Act had been consistently interpreted as not providing an exclusive remedy to a civilian government employee injured during the course of his work. If he was able to show that his injuries were due to some faulty condition for which the government had waived immunity through some tort liability act, then the employee could elect compensation under 5 U. S. C. A. 757, or else seek damages under any applicable tort act.

In *Dahn* v. *Davis*, etc., 258 U. S. 421, 42 Sup. Ct. 320 (1922), a railway clerk employed by the Government was injured during a train wreck, while the Government was operating the railroad. There was a statute entitling persons to sue the Government for damages in the event of its negligent operation of the railroad. There was also in existence the Federal Employees' Compensation Act. The injured employee filed a suit to recover damages under the Railway Act, and the Government sought a dismissal on the ground that the Compensation Act was his only remedy. Far from holding that Compensation was the man's sole and exclusive remedy, Mr. Justice Clarke clearly stated at page 428:

> "This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the U. S. * * *"

The Court in the *Dahn* case then held that the shore-employee involved, had made an election under the facts of that case, to pursue his Compensation remedy, and therefore could not now sue for damages. (The case did not involve a civilian seaman, to whom, as we shall show, different principles apply in determining what constitutes an "election".)

In *U. S.* v. *Marine,* 155 F. 2d 456 (C. C. A. 4th, 1946) a customs inspector, employed by the Government, was injured during his work, while he was on a merchant vessel owned and operated by the United States. Instead of seeking Workmen's Compensation, he filed a suit against the Government under a tort liability act (Suits in Admiralty Act). The United States contended that compensation was his exclusive remedy, but the Court held that his right to elect to sue for damages in tort was "unchallengeable" (p. 458).

In *U. S.* v. *Loyola,* 161 F. 2d 126 (C. C. A. 9th, 1947) a civilian seaman, employed on an army transport became disabled. The Court held that although this was a public vessel, he had a right to seek damages from the Government in tort under the Public Vessels Act.

In *Brooks* v. *U. S.,* 337 U. S. 49, 69, Sup. Ct. 918 (1949), a soldier riding in a private car while on leave, was injured as the result of a collision with a negligently driven Army truck. There was a tort liability act applicable (Federal Tort Claims Act) and there was also a type of compensation act applicable to military personnel. Recovery of damages was permitted, although the plaintiff was a member of the armed forces, because the injuries did not arise out of an activity incidental to his military service. Not being on active duty, his rights were like those of a civilian. In reversing the Court below, and finding in favor of the injured man, Mr. Justice Murphy stated:

(p. 53)

"Provisions in other statutes for disability payments to servicemen * * * indicate no purpose to forbid tort actions under the Tort Claims Act * * * we will not

call either remedy in the present case exclusive, nor pronounce doctrine of election of remedies when Congress has not done so."

(p. 54)

"We conclude that the language, framework and legislative history of the Tort Claims Act require holding that petitioner's actions were well founded."

Gibbs v. *U. S.*, 94 F. Supp. 586 (D. C. Cal., 1950), while a lower Court decision, contains an excellent review of the numerous decisions affecting this problem. It comes to the positive and uncategorical conclusion that the Federal Employees' Compensation Act had never been interpreted as affording an exclusive remedy to federal civilian employees when there was also available a parallel remedy to seek damages against the Government under a tort liability act.

Thus, it was recognized at that time that there was "nothing in the Federal Employees' Compensation Act which directly or indirectly would bar the right" to seek damages against the Government in the absence of an "election", i.e., one could choose to sue for damages or elect to take compensation. *United States* v. *Marine*, 155 F. (2d) 456, 459 (C. C. A. 4th, 1946).

Since it was recognized by the highest judicial authorities that the Federal Compensation Act, read in conjunction with parallel tort legislation waiving sovereign immunity, meant that there was a right of election on behalf of civilians, the Government sought to amend the Federal Employees' Compensation Act in the fall of 1949, so as to eliminate the right of election, relegating civilians employed by the Government, to an exclusive remedy by way of compensation.

Thereafter, by an Act of October 14, 1949, Congress amended section 757 of the Federal Employees' Compensation Act, so that the Section presently reads as follows:

"§ 757. Persons receiving compensation not to be paid for other services; pensions; election; right to compensation as exclusive; exception

(a) As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services in the Army or Navy of the United States: Provided, that whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall *elect which benefits he shall receive.* Such election shall be made within one year after the injury or death, or such further time as the Administrator may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel.* As amended July 1, 1944, c. 373, Title VII, § 705 (a), 58 Stat. 312; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, § 5, 60 Stat. 1049; Oct. 14, 1949, c. 691, Title II, § 201, 63 Stat. 861." (Italics supplied.)

In addition, at 5 U. S. C. A. 791-4 Congress, in the same amendment of October 14, 1949, further provided as follows:

"§ 791-4 Applicability to seamen.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) *Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.* Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868." (Italics supplied.)

While it is probably of little importance, we note that in this case, the libellant sustained his injury before the enactment of the October 14, 1949 amendment. However, the Government acted upon his compensation application, and made its payment of compensation benefits to him, all subsequent to the amendment. The benefits covered a period which was partly before the effective date of the amendment, as well as a period which was subsequent to the effective date of the amendment.

It is significant that the amendment of October, 1949, preserved this right of election in favor of only seamen, but eliminated the right of election of other civilians, showing that Congress recognized that there are special considerations applicable to those following the calling of the sea.

This did not come about by accident. Senator Morse from Oregon introduced a specific amendment (adopted by Congress), which excepted seamen from its provisions, preserving their prior right to elect (See "Recent Trends in the Controversy Over the Extension of Workmen's Compensations", 4 N. A. C. C. A. Law Journal 229, pp. 233-4 (1949)). This amendment was accepted by Senator Douglas, when it was made clear to him that there had been no hearings on this aspect of the pending bill, and that it might otherwise be interpreted as denying the right of

election of Government-employed civilian seamen, as recognized by the Courts. See statement of Senator Douglas at 95th Congressional Record 13609, 138758, as follows:

> "It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal Courts have, in effect, held that federally employed seamen have such an election".

It is therefore quite clear that the Department of Justice and the Bureau of Employees' Compensation attempted to so amend 5 U. S. C. 757, as to relegate civilian seamen, employed on public vessels, to an exclusive remedy by way of Workmen's Compensation, eliminating their right to sue for damages under the Public Vessels Act. This, however, did not meet with Congressional approval. In short, the Government was unsuccessful in its attempt to have Congress over-rule the decisions of the Courts in the Fourth and Ninth Circuits, as set forth in *U. S.* v. *Marine*, 155 F. (2) 456 (C. A. 4th, 1946), and *U. S.* v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947), which was subsequently followed by the recent decision in *Johnson* v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1951), which squarely held that both before and after the 1949 amendment, a civilian seaman, injured on a public vessel, could seek either Workmen's Compensation, or sue in tort, stating as follows:

> "(1) In 1949 Congress passed an amendment to the Federal Employees' Compensation Act for the obvious purpose of confining the liability of the United States for injury or death of an employee to the compensation provided by the statute. See Sections 201 (h), 303 (g) and 305 (b) of the Act, approved October 14, 1949, Ch. 691, U. S. Cong. Serv., 81 Cong., 1st Sess.,

866 et seq., 5 U. S. C. A. §§ 757, 791-4. This enactment put an end to the option found to exist in the decision of this Court in *U. S.* v. *Marine*, supra. But Section 201 (b) was expressly limited during the progress of the bill through the Senate by a provision that it should not apply to a master or a member of the crew of any vessel; and in the debate on the floor the purpose of the limitation was stated to be to preserve the rights of seamen and to leave them in exactly the position in which they then were. 95 Cong. Rec. 13874-5. The Clarification Act had already provided that seamen employed by the War Shipping Administration should not be considered as employees of the United States for the purpose of the Compensation Act; but the Amendment of 1939 was not limited to such seamen but applied to the members of the crew of any vessel. See *Militano* v. *U. S.*, 2 Cir., 156 F. (2d) 599. This enactment is relevant to the present discussion, if at all, in that it indicates the same purpose disclosed in the earlier statutes to enlarge rather than restrict the rights of seamen to recover for personal injuries from the United States. The legislative history of the Public Vessels Act, which is set out in *Canadian Aviators, Ltd.* v. *U. S.*, 324 U. S. 215, 218, 65 S. Ct. 639, 89 L. Ed. 901, and in *American Stevedores* v. *Porello*, 330 U. S. 446, 450, 67 S. Ct. 847, 91 L. Ed. 1011, discloses the same general purpose. In our opinion the government's position is not supported by the circumstances under which the foregoing statutes were enacted."

In the light of the foregoing historical background, it would certainly seem that the Courts of Appeal for the Second and Third Circuits, have now, by their decisions, adopted the very judicial amendment which Congress expressly deleted in 1949.

POINT II

The mere acceptance of compensation by a seaman, is not the equivalent of an election.

As to Government-employed civilian shoreside personnel, it has been held that the Federal Employees' Compensation Act was adopted "to give compensation to its employees, who otherwise would be without remedy", and as to such persons it had been held that receipt and acceptance of compensation benefits is an election, which would be a bar against suing the Government thereafter for damages.

Dahn v. *Davis,* 258 U. S. 421, 41 Sup. Ct. 320 (1922);
Brady v. *Roosevelt S. S. Co.,* 317 U. S. 575, 587, 63 Sup. Ct. 425 (1943);
Militano v. *United States,* 156 F. (2d) 599 (C. A. 2d 1946);
American Stevedores, Inc. v. *Porello, et al,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

None of those cases involved seamen. However, in cases involving seamen injured while employed on a public vessel, the Courts have held that the mere application for compensation benefits, coupled with acceptance of payment of such benefits, did not constitute, in and of itself, an "election".

Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Mandel & Schmidt v. *United States,* 74 F. Supp. 754 (E. D. Pa., 1947) rev. on appeal on other grounds, 191 F. 2d 164;
Johansen v. *United States,* 191 F. (2d) 162, 163 (C. A. 2nd, 1951). (Instant case, dissenting opinion. Majority did not pass on this point.);
Gibbs v. *United States,* 94 F. Supp. 586 (D. C. Calif., 1951);

McKenney v. *United States*, 99 F. Supp. 121 (D. C. Calif., 1951);
Rodriguez v. *United States*, F. Supp. , 1951 A. M. C. 512 (D. C. Penna.).

That seamen's cases should be placed in a separate category, is entirely consistent with the liberal tradition in which the courts have interpreted their rights. Historically, the courts, as well as the Legislature, have adopted special provisions for their benefit and protection, and it has been held that even where a seaman files a suit against his Government, or against a Governmental agency, the Court will not permit a general statute intended for shore workers, to be applied so as to delimit the rights of seamen, where there exist specific laws and rulings applicable to mariners showing an intent to safeguard and enlarge their rights.

Shilman v. *United States, et al.*, 164 F. (2d) 649, 652 (C. C. A. 2d, 1947), cert. den. 333 U. S. 837, 68 Sup. Ct. 608 (1948).
Wagner v. *Panama Railroad Co.*, 299 N. Y. 432 (1949).

In *McCarthy* v. *Amer. Eastern Corp.*, 175 F. (2d) 724 (C. A. 3rd, 1949), the Court held that the word "election", as applied to seamen, is not to be given such a harsh construction, as would put them in a position wherein, at their peril, they would be compelled to give up a substantial right, when the word could be given an interpretation more in keeping with the solicitude which the courts have shown for seamen as wards of the Court throughout the years. That case was cited with approval in *Balado* v. *Lykes Bros. SS Co., Inc.*, 179 F. (2d) 943 (C. A. 2d, 1950).

For the same reasons relied on by the Court in the *McCarthy* case, a seaman cannot release his right to sue for damages for personal injuries, unless it is shown that he signed the release with (a) a full understanding of his legal rights; (b) with knowledge of his physical condition; and (c) for a fair and adequate consideration; and the burden

is upon the seaman's employer to prove these things affirmatively, by positive evidence, in order for the seaman to be deprived of rights given him by Maritime Law.

Garrett v. *Moore McCormack Lines Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942);
Bay State Dredging & Contracting Co. v. *Porter*, 153 F. (2d) 827 (C. A. 1st, 1946);
Hume v. *Moore McCormack Lines, Inc.*, 121 F. (2d) 336 (C. C. A. 2d, 1941).

That same rule has been applied even where the Government is the employer of the seaman.

Muruaga v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

We respectfully submit that, with the foregoing as established law, the mere payment of workmen's compensation to a seaman, and his acceptance of such benefits, would not constitute an "election", where his legal rights were not made known to him, and where the other requirements set forth in the above cases, have not been complied with.

Even in a longshoreman's case, an injured workman cannot "elect" unless he knows that he has an alternative remedy. In *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. (2d) 847 (C. C. A. 9th, 1938), the Court stated:

> "The question thus before this court is whether ignorance on the part of the plaintiff of his right under the act to elect will prevent a valid binding election. In other words, may an employee who has 'elected' to accept compensation under the act without knowledge of the provisions thereof, 'rescind' such election upon discovering his rights thereunder.
>
> * * * * * * *
>
> It seems well settled by the weight of authority in cases other than those dealing with workmen's compensation acts, that an election is not valid and binding where the action has been taken by one without knowledge of his rights and where rights of innocent third parties have not been affected adversely."

It is now well established that the liberal provisions of the Jones Act (46 U. S. C. A. 688) and the General Maritime Law, are read in conjunction with the Public Vessels Act and the Suits in Admiralty Act. These apply to the remedies which seamen and longshoremen have, permitting them to sue for damages sustained on a public vessel of the United States, for maintenance and cure, and even for wages.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Canadian Aviator Ltd. v. *United States,* 324 U. S. 215, 65 Sup. Ct. 639 (1945);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366;
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Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Longshoremen, from time to time, have been held to be seamen within the meaning of the maritime laws, in order that they might be given the greater historical protection which is accorded to seamen in personal injury cases. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872 (1946). However, where a longshoreman has received workmen's compensation under the Longshoremen's Compensation Act, he is not barred thereafter from suing the United States of America for damages, pursuant to the Public Vessels Act.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

If then, a longshoreman, who has received compensation under the Longshoremen's Compensation Act, following an injury received on a public vessel, is not barred from suing the Government thereafter for damages under the Public Vessels Act, then why should an injured seamen be barred, when he supposedly has greater rights? And further, if an injured seaman cannot even give up his right to claim damages by the signing of a release, unless he has been made aware of all of his rights, then how can he waive his right to seek damages where he has not even signed a release, as in this case? See *Muruaga* v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

It therefore would seem to be established and sound law that the mere payment and acceptance by a seaman of workmen's compensation benefits, when he is entitled to sue for damages, would not, in the absence of an express statute to the contrary (which certainly is not the case here), bar him from suing thereafter to recover damages, when he was not made aware of his rights, but, on the contrary, was even misled as to his rights. Of course, the amount received under the Compensation Act in such a case, would properly be deducted from the verdict awarded to the seaman for damages.

Gahagan Construction Corp. v. *Armao*, 165 F. (2d) 301 (C. C. A. 1st, 1948) cert. den. 333 U. S. 876, 68 Sup. Ct. 905 (1948);

Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th, 1936).

CONCLUSION

The Circuit Court came to the conclusion that Congress never intended that civilian seamen working on public vessels should be given greater rights to sue for damages than members of the armed forces. But this would seem to be a matter for Congress to decide.

Rather would it seem that civilian seamen, who perform the same duties on a public vessel, as they would on a merchant vessel owned by the Government, ought not to be deprived of rights which are enjoyed by their brethren working on the latter class of vessels, merchant seamen being unquestionably entitled to sue for damages.

After all, civilian seamen employed on public vessels are not military personnel. They do not enjoy the privileges enacted by Congress for the protection of members of the armed forces, and, while sometimes subject to military law, they remain civilians. (*Osbourne* v. *U. S.* 164 F. (2d) 767, 769 (C. A. 2nd, 1947.)

It is a further fact that all civilian seamen, whether employed on a public vessel or a merchant vessel, do give up certain basic rights, such as the right to strike, by voluntarily consenting to subject themselves to the rigors and discipline of life at sea. This, and other aspects of their employment, has prompted Congress to adopt special legislation for their benefit. In commenting on this aspect of a mariner's vocation, Mr. Justice Byrnes, stated in *Southern SS. Co.* v. *N. L. R. B.*, 316 U. S. 31, 62 Sup. Ct. 886 (1942) at page 39:

> "On the other hand workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by limits upon their ability to help themselves."

This is again seen in the Compensation Act amendment of October, 1949, the importance of which lies in the fact that it shows that Congress also recognized that under existing law, seamen have special rights, and are governed by special rules, in view of their status as wards of the Court. It was also a recognition by Congress that, under existing law, compensation is not the exclusive remedy of seamen employed by the Government on a public vessel.

The decisions of the Fourth and Ninth Circuits therefore appear to be in accord with the historical background of this legislation, and to correctly interpret the pertinent

principles of law applicable to this case, while the recent decisions of the Second and Third Circuits, seem to be a complete departure from what had previously been recognized as well established law.

A writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit to resolve the conflict between the Circuits on this important Federal question.

Respectfully submitted,

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 401

KONRAD G. JOHANSEN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM

WILLIAM L. STANDARD,
Attorney for Petitioner.

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REPLY MEMORANDUM

We take this opportunity to call attention to a recent unreported decision affecting the subject matter involved herein. Following the rule applicable in the Ninth Circuit (see *United States* v. *Loyola*, 161 F. 2d 126), on November 14, 1951, District Judge George B. Harris awarded substantial damages to the next of kin of ten civilian seamen who lost their lives when a public vessel on which they were employed, the Clarksdale Victory, ran on the reefs, as a result of negligent navigation. In that case, *Cerardo* v. *United States*, ____ F. Supp. ____, Judge Harris thus continued to follow the rule applicable in his Circuit, as well as in the Fourth Circuit, notwithstanding the contrary conclusions which had been reached in the Second and Third Circuits, in the *Johansen* and *Mandel* cases, respectively.

Respectfully submitted,

WILLIAM L. STANDARD,
Attorney for Petitioner.

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Preliminary Statement

This is an appeal from an order made on respondent's motion, dismissing a civilian seaman's suit brought under the Public Vessels Act (46 U. S. C. 741-9). The District Court (S. D. N. Y.) had granted respondent's motion to dismiss on one ground. On appeal, the dismissal was affirmed (C. A. 2d), but on a completely different ground, over a dissenting opinion. Certiorari was granted on a showing that there was a conflict among the circuits with reference to the ground relied upon by the Court of Appeals (2d Circuit).

I

Facts

The facts are not in dispute. Petitioner filed a suit in admiralty in the United States District Court for the Southern District of New York, seeking to recover $25,000 damages for personal injuries sustained while he was employed by the government, as a civilian seaman, comprising part of the crew of the U.S.A.T. Kingsport Victory, a public vessel of the United States.

The libel alleged that on August 5, 1949, the petitioner, while working, was hit in the leg by falling lumber and was injured, because of the negligence of the respondent and the unseaworthiness of the vessel. The respondent's own exhibits show that at the time of this accident, the vessel was safely at its pier in Brooklyn, New York, and was not engaged in any military operation. (The majority opinion of the Court of Appeals contains an erroneous statement in its recitation of facts, when it alleges that "the parties agree that the transport was engaged in a military operation" at the time of the accident. There was no such agreement or stipulation between the parties or their counsel, express or implied, at any time, nor has there ever been any claim or evidence to that effect.)

Petitioner was admitted to a U. S. Marine Hospital that same day, where he received treatment for more than two and a half months, until October 24, 1949, with two further weeks of disability thereafter, following a skin graft operation, and other treatment which he received for his lacerated leg.

It was conceded by the Government, in the court below, that petitioner was expressly informed by his superiors, acting on behalf of the United States, that he had no right to seek damages against the Government under the Public Vessels Act, but was told instead that his sole exclusive right was to receive compensation benefits under the United

States Employees' Compensation Act. Believing this information to be correct, and influenced by it, he duly made application for compensation benefits, and was awarded and paid $358.20, until his disability terminated on November 7, 1949, at which time he resumed his duties. There was never any hearing.

He then brought this suit on February 8, 1950, on learning that he had a right to seek damages under the Public Vessels Act, in lieu of compensation. The District Court dismissed the suit, holding that when he was injured, petitioner had a right to elect whether to sue the Government for damages, and that his mere acceptance of compensation constituted an "election", even though his employer had misled him as to his rights (reported as *Johansen* v. *U. S.*, 1951 A. M. C. 117).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal, but on a completely different ground. It held that a civilian seaman employed by the Government on a public vessel, although injured because of fault attributable to the United States, has no right of election; that such a person has no right to sue the Government for damages for personal injuries brought about by his employer's negligence or the vessel's unseaworthiness; and that his exclusive remedy would be to seek workmen's compensation benefits (reported as *Johansen* v. *U. S.*, 191 F. 2d 162 (C. A. 2nd, 1951). Circuit Judge Chase wrote the majority opinion. Circuit Judge Frank wrote a dissenting opinion to the effect that such a seaman has a right of election under the reasoning of *Johnson* v. *U. S.*, 186 F. 2d (C. A. 4th, 1950), and since petitioner's superiors had erroneously led him to believe that his sole remedy was under the Compensation Act, petitioner never actually exercised his right of election, and therefore had a right to maintain this suit.

A petition seeking certiorari was filed because the decision herein enunciated a doctrine which was in conflict with the following decisions in other Circuits:

Johnson v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1950); *U. S.* v. *Marine*, 155 F. (2d) 456 (C. A. 4th, 1946); *U. S.* v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947).

II

The Question Presented

The majority opinion of the Court of Appeals succinctly stated the question presented, as follows:

> "This appeal requires us to decide whether a civil employee of the United States who is employed as a member of a crew of an army transport may sue the government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees' Compensation Act, 5 U. S. C. §§ 751 et seq."

Since the majority opinion came to the conclusion that petitioner's exclusive remedy lay under the Compensation Act, it did not decide whether payment to him of compensation benefits, when his employer had misinformed him concerning his rights, precluded him from bringing the suit for damages. The dissenting opinion decided these questions in favor of petitioner.

III

Petitioner Was Entitled to Sue Under the Public Vessels Act

The basic question here is whether the petitioner was entitled to sue the Government for damages under a tort liability act (The Public Vessels Act), or whether he was relegated to an exclusive remedy under the Federal Employees' Compensation Act. It thus becomes necessary

to consider how the courts have interpreted both of these acts.

In 1926, the Public Vessels Act was adopted (46 U. S. C. section 741-749), giving a right to sue the Government for damages resulting from the fault of a public vessel of the United States. At first this was interpreted as referring to "damage physically done by a ship" (*O'Neal* v. *U. S.*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, 1925). That interpretation, however, was held to be too narrow a construction. In *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 65 Sup. Ct. 639 (1945), it was finally held that the Public Vessels Act makes the Government liable to respond in damages for the negligence of its personnel, or the unseaworthiness of a public vessel; that the Act is not limited to damage physically done by a ship and that the Act gives a right of recovery against the Government for personal injuries sustained by civilian personnel while working on a public vessel.

American Stevedores, Inc. v. *Porello*, 330 U. S. 446, 67 Sup. Ct. 847 (1947);

Mejia v. *United States*, 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366 (1946);

United States v. *Loyola*, 161 F. (2d) 126 (C. C. A. 9th, 1947);

Johnson v. *United States*, 186 F. (2d) 120 (C. A. 4th, 1950);

Lauro v. *United States*, 162 F. (2d) 32 (C. C. A. 2d, 1947);

Thomason v. *United States*, 184 F. (2d) 105 (C. A. 9th, 1950);

Jentry v. *United States*, 73 F. Supp. 899 (D. C. Cal., 1947);

Lawson v. *United States*, 1950 A. M. C. 617 (D. C. Cal.).

Meanwhile, however, the Public Vessels Act was further construed as holding that it did not give a right to

recover damages from the Government, for injuries sustained by military personnel in the line of active duty.

Brady v. *United States*, 151 F. (2d) 742 (C. C. A. 2d), cert. den. 326 U. S. 795, 66 Sup. Ct. 484, ref. den. 328 U. S. 880, 66 Sup. Ct. 1348 (1946);
Dobson v. *United States*, 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 Sup. Ct. 179 (1929).

This is similar to the interpretation recently given to the Federal Tort Claims Act, under which shore-side military personnel have similarly been held not entitled to sue the Government for damages for personal injuries sustained in the line of active duty (*Feres* v. *U. S.*, 340 U. S. 135, 71 Sup. Ct. 153 (1950)).

Thus the Public Vessels Act, like the Federal Tort Claims Act, recognized a distinction between suits by civilians, as contrasted with suits by members of the armed forces, injured in line of duty. Congress had decided that civilians were to be given the right to sue the Government for damages based on tort, while military personnel injured in line of duty, were to be denied such a right.

Since petitioner herein was a civilian, and since it appears clear from the foregoing authorities, that there is nothing in the Public Vessels Act to prevent him from recovering damages based on tort, we now turn to a consideration of the Federal Employees' Compensation Act.

IV

The Federal Employees' Compensation Act Did Not Provide an Exclusive Remedy

Prior to the decision of the Court of Appeals herein, the Federal Employees' Compensation Act had been consistently interpreted as not providing an exclusive remedy to a civilian government employee injured during the course of his work. As we shall see, if he was able to show that his

injuries were due to some faulty condition for which the government had waived immunity through some tort liability act, then the employee could elect compensation under 5 U. S. C. A. 757, or else seek damages under any applicable tort act.

Originally 5 U. S. C. A. § 757 (Federal Employees' Compensation Act) read as follows:

> "§ 757. Person receiving not to be paid for other services; pensions. As long as the employee is in receipt of compensation under this chapter, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States (Sept. 7, 1916, c. 458, § 7, 39 Stat. 743)."

Literally read, this compensation statute, on its face, would seem to indicate nothing more than that a disabled federal employee, who receives workmen's compensation, shall not, at the same time, also receive his salary. However, we shall see the Act did not receive this simple construction. While the Act did not mention "damages", it was soon construed to also mean that in those instances where the employee had a right to sue the Government in tort for damages, such a course could be pursued only in lieu of workmen's compensation.

Thus, in *Dahn* v. *Davis*, etc., 258 U. S. 421, 42 Sup. Ct. 320 (1922), a railway clerk employed by the Government was injured during a train wreck, while the Government was operating the railroad. There was a statute entitling persons to sue the Government for damages in the event of its negligent operation of the railroad. There was also in existence the Federal Employees' Compensation Act. The injured employee filed a suit to recover damages under the Railway Act, and the Government sought a dismissal on the ground that the Compensation Act was his only remedy.

Far from holding that the Compensation Act was the man's sole and exclusive remedy, as respondent claims, Mr. Justice Clarke clearly stated at page 428:

> "This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the U. S. * * *."

The Court in the *Dahn* case then held that the shore-employee involved, had made an election under the facts of that case, to pursue his Compensation remedy, and therefore could not now sue for damages. (The case did not involve a civilian seaman, to whom, as we shall show, different principles apply in determining what constitutes an "election".)

In *U. S.* v. *Marine*, 155 F. 2d 456 (C. C. A. 4th, 1946) a customs inspector, employed by the Government, was injured during his work, while he was on a merchant vessel owned and operated by the United States. Instead of seeking Workmen's Compensation, he filed a suit against the Government under a tort liability act (Suits in Admiralty Act). The United States contended that compensation was his exclusive remedy, but the Court held that his right to elect to sue for damages in tort was "unchallengeable" (p. 458).

In *U. S.* v. *Loyola*, 161 F. 2d 126 (C. C. A. 9th, 1947) a civilian seaman, employed on an army transport became disabled. The Court held that although this was a public vessel, he had a right to seek damages from the Government in tort under the Public Vessels Act.

In *Johnson* v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1951), the same result was reached.

In *Panama R. Co.* v. *Strobel*, 282 F. 52 (C. C. A. Canal Zone, 1922), the court stated page 53:

> "Strobel was an employee of the United States, and entitled to avail himself of the provisions of the Compensation Act. We do not think, however, that this was an exclusive remedy * * *."

See also *Payne* v. *Cohlmeyer*, 275 F. 803 (C. C. A. 7th, 1921) and *Midwest Nat. Bank & Trust Co.* v. *Davis*, 288 Mo. 563, 233 S. W. 406 (1921).

In *Brooks* v. *U. S.*, 337 U. S. 49, 69, Sup. Ct. 918 (1949), a soldier riding in a private car while on leave, was injured as the result of a collision with a negligently driven Army truck. There was a tort liability act applicable (Federal Tort Claims Act) and there was also a type of compensation act applicable to military personnel. Recovery of damages was permitted, although the plaintiff was a member of the armed forces, because the injuries did not arise out of an activity incidental to his military service. Not being on active duty, his rights were like those of a civilian. In reversing the Court below, and finding in favor of the injured man, Mr. Justice Murphy stated:

(p. 53)

> "Provisions in other statutes for disability payments to servicemen * * * indicate no purpose to forbid tort actions under the Tort Claims Act * * * we will not call either remedy in the present case exclusive, nor pronounce doctrine of election of remedies when Congress has not done so."

(p. 54)

> "We conclude that the language, framework and legislative history of the Tort Claims Act require holding that petitioner's actions were well founded."

Gibbs v. *U. S.*, 94 F. Supp. 586 (D. C. Cal., 1950), while a lower Court decision, contains an excellent review of the numerous decisions affecting this problem. It comes to the positive and uncategorical conclusion that the Federal Employees' Compensation Act had never been interpreted as affording an exclusive remedy to federal civilian employees when there was also available a parallel remedy to seek damages against the Government under a tort liability act.

Thus, it was recognized at that time that there was "nothing in the Federal Employees' Compensation Act which

directly or indirectly would bar the right" to seek damages against the Government in the absence of an "election", i.e., one could choose to sue for damages or elect to take compensation. *United States* v. *Marine*, 155 F. (2d) 456, 459 (C. C. A. 4th, 1946).

Since it was recognized by the highest judicial authorities that the Federal Compensation Act, read in conjunction with parallel tort legislation waiving sovereign immunity, meant that there was a right of election on behalf of civilians, the Government sought to amend the Federal Employees' Compensation Act in the fall of 1949, so as to eliminate the right of election, relegating civilians employed by the Government, to an exclusive remedy by way of compensation. We shall see what happened in connection with the government's proposed amendment.

V

The Decision of the Court Below Was an Attempt to Legislate in a Manner Rejected by Congress

By an Act of October 14, 1949, Congress amended section 757 of the Federal Employees' Compensation Act, so that the section presently reads as follows:

> "§ 757. Persons receiving compensation not to be paid for other services; pensions; election; right to compensation as exclusive; exception
>
> (a) As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services in the Army or Navy of the United States: Provided, that whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by

reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall *elect which benefits he shall receive.* Such election shall be made within one year after the injury or death, or such further time as the Administrator may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

(b) The liability of the United States or any of its instrumentalities under sections 754-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel.* As amended July 1, 1944, c. 373, Title VII, §705 (a), 58 Stat. 312; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, § 5, 60 Stat. 1049; Oct. 14, 1949, c. 691, Title II, § 201, 63 Stat. 861." (Italics supplied.)

In addition, at 5 U. S. C. A. 791-4 Congress, in the same amendment of October 14, 1949, further provided as follows:

"§ 791-4 Applicability to seamen.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the

terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) *Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.* Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868." (Italics supplied.)

(While it is probably of little importance, we note that in this case, the petitioner sustained his injury before the enactment of the October 14, 1949 amendment. However, the Government acted upon his compensation application, and made its payment of compensation benefits to him, all subsequent to the amendment. The benefits covered a period which was partly before the effective date of the amendment, as well as a period which was subsequent to the effective date of the amendment.)

It is significant that the amendment of October, 1949, preserved this right of election in favor of only seamen, but eliminated the right of election of other civilians, showing that Congress recognized that there are special considerations applicable to those following the calling of the sea.

This did not come about by accident. Senator Morse from Oregon introduced a specific amendment (adopted by Congress), which excepted seamen from its provisions, preserving their prior right to elect (See "Recent Trends in the Controversy Over the Extension of Workmen's Compensations", 4 N. A. C. C. A. Law Journal 229, pp. 233-4 (1949)). This amendment was accepted by Senator Douglas, when it was made clear to him that there had been no hearings on this aspect of the pending bill, and that it might otherwise be interpreted as denying the right of election of Government-employed civilian seamen, as recognized by the Courts. See statement of Senator Douglas at 95th Congressional Record 13609, 13875-8, as follows:

"It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those

government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal Courts have, in effect, held that federally employed seamen have such an election."

It is therefore quite clear that the Department of Justice and the Bureau of Employees' Compensation attempted to so amend 5 U. S. C. 757, as to relegate civilian seamen, employed on public vessels, to an exclusive remedy by way of Workmen's Compensation, eliminating their right to sue for damages under the Public Vessels Act. This, however, did not meet with Congressional approval. In short, the Government was unsuccessful in its attempt to have Congress over-rule the decisions of the Courts in the Fourth and Ninth Circuits, as set forth in *U. S.* v. *Marine,* 155 F. (2) 456 (C. A. 4th, 1946), and *U. S.* v. *Loyola,* 161 F. (2d) 126 (C. A. 9th, 1947), which was subsequently followed by the recent decision in *Johnson* v. *U. S.,* 186 F. (2d) 120 (C. A. 4th, 1951), which squarely held that both before and after the 1949 amendment, a civilian seaman, injured on a public vessel, could seek either Workmen's Compensation, or sue in tort, stating as follows:

"(1) In 1949 Congress passed an amendment to the Federal Employees' Compensation Act for the obvious purpose of confining the liability of the United States for injury or death of an employee to the compensation provided by the statute. See Sections 201 (b), 303 (g) and 305 (b) of the Act, approved October 14, 1949, Ch. 691, U. S. Cong. Serv., 81 Cong., 1st Sess., 866 et seq., 5 U. S. C. A. §§ 757, 791-4. This enactment put an end to the option found to exist in the decision of this Court in *U. S.* v. *Marine,* supra. But Section 201 (b) was expressly limited during the progress of the bill through the Senate by a provision that it should not apply to a master or a member of the crew of any vessel; and in the debate on the floor the

purpose of the limitation was stated to be to preserve the rights of seamen and to leave them in exactly the position in which they then were. 95 Cong. Rec. 13874-5. The Clarification Act had already provided that seamen employed by the War Shipping Administration should not be considered as employees of the United States for the purpose of the Compensation Act; but the Amendment of 1949 was not limited to such seamen but applied to the members of the crew of any vessel. See *Militano* v. *U. S.*, 2 Cir., 156 F. (2d) 599. This enactment is relevant to the present discussion, if at all, in that it indicates the same purpose disclosed in the earlier statutes to enlarge rather than restrict the rights of seamen to recover for personal injuries from the United States. The legislative history of the Public Vessels Act, which is set out in *Canadian Aviators, Ltd.* v. *U. S.*, 324 U. S. 215, 218, 65 S. Ct. 639, 89 L. Ed. 901, and in *American Stevedores* v. *Porello*, 330 U. S. 446, 450, 67 S. Ct. 847, 91 L. Ed. 1011, discloses the same general purpose. In our opinion the government's position is not supported by the circumstances under which the foregoing statutes were enacted."

In the light of the foregoing historical background, it would certainly seem that the Court of Appeals for the Second Circuit, has now, by its decision herein, adopted the very judicial amendment which Congress expressly deleted in 1949.

The majority opinion, in coming to its conclusion in the instant case, refused to follow the unbroken line of cases which, until then, had always sustained the validity of a seaman's suit of this type. Not even a single sentence of its opinion was devoted to the historical background of civilian seamen's rights, in general, or to this legislation in particular. The Circuit Court majority did not cite even a single civilian seaman's case in support of its position. What it did, was to point out that if the petitioner had been a member of the armed forces (which he was not), injured in line of duty aboard the vessel, his sole right would have been to recover "compensation" (presumably pursuant to

38 U. S. C. 701 et seq., originally enacted in 1918, which applies only to *military personnel*). From this it concluded that, there being no contrary "clear warrant in the statutory language" of the Federal Employees' Compensation Act (5 U. S. C. 757, originally enacted in 1916, and applying only to *civilian personnel*), Congress must therefore have intended that injured civilian employees of the Government should likewise be confined solely to their own form of workmen's compensation.

We respectfully submit that this reasoning appears to be a complete non sequitur. The Court gave no explanation as to why, for the first time, it was refusing to follow an interpretation of the law which had been recognized for some 30 years, and which Congress had expressly refused to disturb by its 1949 amendment. It did not explain how a Court, sitting in the year 1951, could search out what Congress had intended in 1916, by comparing it with a subsequent act of 1918, applicable to a completely different class of persons.

In *Hust* v. *Moore McCormack Lines*, 328 U. S. 707, 715 reference was made by this Court, of the struggle by civilian seamen to avoid compensation statutes, and of their success in persuading Congress to enact tort damage legislation on their behalf through the years. In commenting on this struggle in *Wagner* v. *Panama R. Co.*, 299 N. Y. 438, 87 N. E. (2d) 448 (1949) the Court stated at page 441:

> "We may not lightly assume an intention by Congress to depart so abruptly from a policy which through a long period of years has become deeply imbedded in maritime law and has been consistently administered by the Courts of this land."

In *Halycon Lines & Vinke & Co.* v. *Haenn Ship Ceiling & Refitting Corp. et al.*, U. S. , Sup. Ct. , 20 L. W. 4094 (decided 1/14/52), this Court recently reiterated the proposition that established law should be changed by Congress, rather than by the courts. In that case, this Court was asked to rule, in a

personal injury maritime tort case, that contribution among joint tort feasors should be permitted. In refusing to change the long recognized common law rule covering this subject, this Court stated:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. This Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat. 1007, 46 U. S. C. § 688), the Public Vessels Act (43 Stat. 1112, 46 U. S. C. §§ 781-790), the Limited Liability Act (R. S. § 4281, as amended, 46 U. S. C. § 181 et seq.) and the Harter Act (27 Stat. 445, 46 U. S. C. §§ 190-195). Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, or casualty insurance companies desire such a change to be made.
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> * * * * * *
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> In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

VI

The Mere Acceptance of Compensation by a Seaman, Is Not the Equivalent of an Election

As to Government-employed civilian shoreside personnel, it has been held that mere receipt and acceptance of compensation benefits is an election, which would be a bar against suing the Government thereafter for damages.

Dahn v. *Davis*, 258 U. S. 421, 41 Sup. Ct. 320 (1922);
Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575, 587, 63 Sup. Ct. 425 (1943);
Militano v. *United States*, 156 F. (2d) 599 (C. A. 2d 1946);
American Stevedores, Inc. v. *Porello, et al.*, 330 U. S. 446, 67 Sup. Ct. 847 (1947).

None of those cases involved seamen. However, in cases involving seamen injured while employed on a public vessel, the Courts have held that the mere application for compensation benefits, coupled with acceptance of payment of such benefits, did not constitute, in and of itself, an "election".

Johnson v. *United States*, 186 F. (2d) 120 (C. A. 4th, 1950);
Mandel & Schmidt v. *United States*, 74 F. Supp. 754 (E. D. Pa., 1947) rev. on appeal on other grounds, 191 F. 2d 164;
Johansen v. *United States*, 191 F. (2d) 162, 163 (C. A. 2nd, 1951). (Instant case, dissenting opinion. Majority did not pass on this point.);
Gibbs v. *United States*, 94 F. Supp. 586 (D. C. Calif., 1951);
McKenney v. *United States*, 99 F. Supp. 121 (D. C. Calif., 1951);
Rodriguez v. *United States*, F. Supp. , 1951

That seamen's cases should be placed in a separate category, is entirely consistent with the liberal tradition in which the courts have interpreted their rights. Historically, the courts, as well as the Legislature, have adopted special provisions for their benefit and protection, and it has been held that even where a seaman files a suit against his Government, or against a Governmental agency, the Court will not permit a general statute intended for shore workers, to be applied so as to delimit the rights of seamen, where there exist specific laws and rulings applicable to mariners showing an intent to safeguard and enlarge their rights.

Shilman v. *United States, et al.*, 164 F. (2d) 649, 652 (C. C. A. 2d, 1947), cert. den. 333 U. S. 837, 68 Sup. Ct. 608 (1948).

Wagner v. *Panama Railroad Co.*, 299 N. Y. 432 (1949).

In *McCarthy* v. *Amer. Eastern Corp.*, 175 F. (2d) 724 (C. A. 3rd, 1949), the Court held that the word "election", as applied to seamen, is not to be given such a harsh construction, as would put them in a position wherein, at their peril, they would be compelled to give up a substantial right, when the word could be given an interpretation more in keeping with the solicitude which the courts have shown for seamen as wards of the Court throughout the years. That case was cited with approval in *Balado* v. *Lykes Bros. SS. Co., Inc.*, 179 F. (2d) 943 (C. A. 2d, 1950).

For the same reasons relied on by the Court in the *McCarthy* case, a seaman cannot release his right to sue for damages for personal injuries, unless it is shown that he signed the release with (a) a full understanding of his legal rights; (b) with knowledge of his physical condition; and (c) for a fair and adequate consideration; and the burden is upon the seaman's employer to prove these things affirmatively, by positive evidence, in order for the seaman to be deprived of rights given him by Maritime Law.

Garrett v. *Moore McCormack Lines Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942);
Bay State Dredging & Contracting Co. v. *Porter*, 153 F. (2d) 827 (C. A. 1st, 1946);
Hume v. *Moore McCormack Lines, Inc.*, 121 F. (2d) 336 (C. C. A. 2d, 1941).

That same rule has been applied even where the Government is the employer of the seaman.

Muruaga v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

We respectfully submit that, with the foregoing as established law, the mere payment of workmen's compensation to a seaman, and his acceptance of such benefits, would not constitute an "election", where his legal rights were not made known to him, and where the other requirements set forth in the above cases, have not been complied with. Petitioner's case here is even stronger, since he was actually misled as to his rights.

Even in a longshoreman's case, an injured workman cannot "elect" unless he knows that he has an alternative remedy. In *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. (2d) 847 (C. C. A. 9th, 1938), the Court stated:

> "The question thus before this court is whether ignorance on the part of the plaintiff of his right under the act to elect will prevent a valid binding election. In other words, may an employee who has 'elected' to accept compensation under the act without knowledge of the provisions thereof, 'rescind' such election upon discovering his rights thereunder.
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> * * * * * *
>
> It seems well settled by the weight of authority in cases other than those dealing with workmen's compensation acts, that an election is not valid and binding where the action has been taken by one without knowledge of his rights and where rights of innocent third parties have not been affected adversely."

It is now well established that the liberal provisions of the Jones Act (46 U. S. C. A. 688) and the General Mari-

time Law, are read in conjunction with the Public Vessels Act and the Suits in Admiralty Act. These apply to the remedies which seamen and longshoremen have, permitting them to sue for damages sustained on a public vessel of the United States, for maintenance and cure, and even for wages.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Canadian Aviator Ltd. v. *United States,* 324 U. S. 215, 65 Sup. Ct. 639 (1945);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366;
United States v. *Loyola,* 161 F. (2d) 126 (C. C. A. 9th, 1947);
Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Longshoremen, from time to time, have been held to be seamen within the meaning of the maritime laws, in order that they might be given the greater historical protection which is accorded to seamen in personal injury cases. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872 (1946). However, where a longshoreman has received workmen's compensation under the Longshoremen's Compensation Act, he is not barred thereafter from suing the United States of America for damages, pursuant to the Public Vessels Act.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

If then, a longshoreman, who has received compensation under the Longshoremen's Compensation Act, following an injury received on a public vessel, is not barred from suing the Government thereafter for damages under the Public Vessels Act, then why should an injured seaman be barred, when he supposedly has greater rights? And further, if an injured seaman cannot even give up his right to claim damages by the signing of a release, unless he has been made aware of all of his rights, then how can he waive his right to seek damages where he has not even signed a release, as in this case? See *Muruaga* v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

It therefore would seem to be established and sound law that the mere payment and acceptance by a seaman of workmen's compensation benefits, when he is entitled to sue for damages, would not, in the absence of an express statute to the contrary (which certainly is not the case here), bar him from suing thereafter to recover damages, when he was not made aware of his rights, but, on the contrary, was even misled as to his rights. Of course, the amount received under the Compensation Act in such a case, would properly be deducted from the verdict awarded to the seaman for damages.

Gahagan Construction Corp. v. *Armao*, 165 F. (2d) 301 (C. C. A. 1st, 1948) cert. den. 333 U. S. 876, 68 Sup. Ct. 905 (1948);

Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th, 1936).

CONCLUSION

The Circuit Court came to the conclusion that Congress never intended that civilian seamen working on public vessels should be given greater rights to sue for damages than members of the armed forces. But this would seem to be a matter for Congress to decide.

Rather would it seem that civilian seamen, who perform the same duties on a public vessel, as they would on a merchant vessel owned by the Government, ought not to

be deprived of rights which are enjoyed by their brethren working on the latter class of vessels, merchant seamen being unquestionably entitled to sue for damages.

After all, civilian seamen employed on public vessels are not military personnel. They do not enjoy the privileges enacted by Congress for the protection of members of the armed forces, and, while sometimes subject to military law, they remain civilians. (*Osbourne* v. *U. S.*, 164 F. (2d) 767, 769 (C. A. 2nd, 1947).)

It is a further fact that all civilian seamen, whether employed on a public vessel or a merchant vessel, do give up certain basic rights, such as the right to strike, by voluntarily consenting to subject themselves to the rigors and discipline of life at sea. This, and other aspects of their employment, has prompted Congress to adopt special legislation for their benefit. In commenting on this aspect of a mariner's vocation, Mr. Justice Byrnes, stated in *Southern SS. Co.* v. *N. L. R. B.*, 316 U. S. 31, 62 Sup. Ct. 886 (1942) at page 39:

> "On the other hand workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by limits upon their ability to help themselves."

This is again seen in the Compensation Act amendment of October, 1949, the importance of which lies in the fact that it shows that Congress also recognized that under existing law, seamen have special rights, and are governed by special rules in view of their status as wards of the Court. It was also a recognition by Congress that, under existing law, compensation is not the exclusive remedy of seamen employed by the Government on a public vessel.

The decisions of the Fourth and Ninth Circuits therefore appear to be in accord with the historical background of this legislation, and to correctly interpret the pertinent principles of law applicable to this case, while the recent decisions of the Second and Third Circuits (*Mandel* v. *U. S.*, which is being argued at the same time as this case), seem to be a complete departure from what had previously been recognized as well established law.

In 1915, the Jones Act was adopted (46 U. S. C. A. 688). In 1925 the Suits in Admiralty Act was adopted (46 U. S. C. A. 741 et seq.). In 1926 the Public Vessels Act was adopted (46 U. S. C. A. 781 et seq.). In 1943 the Clarification Act was adopted (50 App. U. S. C. A. 1291). In 1950 Public Law 877 was enacted. All of these statutes show a clear intent to enlarge and protect the rights of civilian seamen as a class, and to accord to those employed on Government vessels, the same right to sue for damages as is enjoyed by those on privately operated vessels. This statutory scheme is further carried out in the Federal Tort Claims Act which gives civilians a right to sue for damages for negligence of Government employees, but expressly excludes those cases wherein Congress had already provided a remedy through the Suits in Admiralty Act and the Public Vessels Act (28 U. C. C. A. 2680(d)).

Had Congress intended to write an exception into the Public Vessels Act of the type contended for by the respondent, we may assume it would have done so. The failure to include such an exception in that statute, indicates that civilian seamen, whether employed on private or public vessels of the United States, have a right of action, under the terms of this sweeping legislation, to seek damages for personal injuries based on tort.

If there is to be any change in this well established proposition, the change should emanate from Congress, not from the courts.

The decisions of the District Court and the Court of Appeals, should be reversed.

Respectfully submitted,

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
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on the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
Of Counsel
and
on the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN, Petitioner, against THE UNITED STATES OF AMERICA.		No. 401

REPLY BRIEF FOR PETITIONER

The government's position is that civilian seamen, employed by the government on *merchant* vessels, are properly entitled to sue for damages under the Suits in Admiralty Act; but civilian seamen employed by the government on *public* vessels, should be deprived of a like right, notwithstanding the provisions of the Public Vessels Act. In support of that contention, the government's brief urges that (a) the Federal Employees' Compensation Act applies to its public vessel mariners, but has never applied to its merchant vessel mariners, and (b) legislative developments indicate that Congress did not recognize that civilians employed by the government, had a right to elect between compensation and a suit for damages. We will demonstrate that both of these assumptions are without validity.

I

In 34 Op. A. G. 12[illegible] (1924), the Attorney General ruled that civilian seamen, injured on *merchant* vessels operated by the government through the U. S. Shipping Board Emergency Fleet Corporation, were employees of the government, entitled to benefits under the Federal Employees' Compensation Act. The opinion at least impliedly recog-

nized their right to elect either compensation or to seek damages, for it made reference to congressional debate, wherein the need for eliminating any possibility of double recovery, was recognized. That congressional debate was concerned with an act of 1919, involving an appropriation under the Compensation Act. The same opinion went on to hold that those seamen, who were employed by private companies which operated vessels under Agency Agreements for the government, were not government employees, and were therefore not entitled to the benefits of the Compensation Act as government employees. This part of the opinion was soon overruled by the opinion to which we shall now make reference.

Under 34 Op. A. G. 363 (January 17, 1925), Attorney General Stone ruled that civilian seamen, injured on *merchant* vessels owned by the government, although operated by private companies under Agency Agreements, were also employees of the government, and that they were therefore similarly entitled to the benefits of the Compensation Act, unless they had already been otherwise paid benefits for such injury. (The opinion pointed out that additional factual data submitted subsequent to the prior ruling, indicated that these men were not really employees of the private companies, as held in the prior opinion.)

Further, when Congress adopted the Clarification Act in 1943, it expressly recognized that notwithstanding the provisions of the Suits in Admiralty Act, under which government employed civilian seamen could sue for damages, they were also entitled to an alternative right to seek benefits under the U. S. Employees' Compensation Act. The Clarification Act applied only to merchant seamen employed by the government through the War Shipping Administration and its successors in interest. It was feared that these seamen might, because of this Act, be held to have a double right of recovery. Accordingly, Congress inserted therein a provision reading as follows:

> "Such seamen * * * shall not be considered as officers or employees of the United States for the purposes of

the United States Employees' Compensation Act" (50 War App. Section 1291, Ch. 26, 57 Stat. 45, H. R. 133).

If the merchant seamen affected by this legislation were not entitled to compensation, that provision would have been unnecessary. Senate report 62, from the Committee on Commerce, which accompanied the Clarification Act (H. R. 133), stated as follows at page 5:

> "Present day operating conditions often make uncertain in some cases whether the vessel is a merchant or a public vessel. * * * In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the U. S. Employees' Compensation Act in the event of injury or death."
>
> * * * * * * *
>
> (p. 12) "The effect of this legislation is to eliminate the danger that seamen may recover both against the Federal Employees' Compensation fund and under his statutory or common-law remedies for the same injury."

House report number 107 of the Committee of Merchant Marine and Fisheries, February 8th, 1943; also supporting H. R. 133, stated at page 13:

> "It has become trite to say that this is a war of transportation, since ocean transportation is a limiting factor which will determine the amount of supplies or number of troops that can be transported to the many theatres of active combat. * * * The Administrator also performs very important functions in the conduct of the economic phases of the war effort * * *."
>
> * * * * * * *
>
> (p. 22) "It has also been the fixed policy of the War Shipping Administration as far as possible to treat claims for injury, illness, death, and so forth, relating to seamen who are employed aboard vessels that might be classified technically as public vessels, in the same manner as such claims relating to seamen who are employed aboard merchant vessels are treated."

Annexed to the report on H. R. 133, there also is a letter from the U. S. Employees' Compensation Commission dated July 31st, 1942, stating:

> "It appears from information received by the Commission that the employment arrangement, with respect to seamen engaged upon vessels operated by or for the War Shipping Administration is such as to give seamen upon such vessels status as civil employees of the United States. As such, they or their dependents would be entitled to receive the full protection entitled to workmen under the Federal Employees' Compensation Act * * *."

Senate report 1655 (quoting from House report 2572 in connection with this bill) states as follows, at Page 21:

> "These men have faced hardships, capture, injury and death in the forefront of the battle with the enemy. Their courage has been high and their spirits unflagging. Many of these men who have had their vessels torpedoed from under them have reached shore only to return to the conflict again. At sea they must constantly be on the alert and face danger and even death every hour of the day and night. No words can be too strong to express the value of their services to the nation in this war."

It is therefore quite clear that neither Congress, nor the administrative agencies above adverted to, and who were involved in this legislation, were of the opinion that there were any basic distinctions between civilian seamen employed on merchant vessels of the United States, as compared with civilian seamen employed on board public vessels of the United States. It is also quite clear that they envisaged no difficulties in connection with personal injury suits for damages by such seamen.

If there were any question as to whether government employed civilians had the right to elect, that question was completely removed by enactment of an amendment to the Compensation Act, on July 1st, 1944. On that

date, the Public Health Service Act was adopted. The pertinent provision is Title VII, Ch. 373, Section 605, (58 Stat. 712, Public Law 410, H. R. 4624, adopted 78th Congress, Second Session). That section provides:

> Sec. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U. S. C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: "*Provided*, that whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

By this amendment which was in effect at the time petitioner herein sustained his injury, Congress inserted express language into the Compensation Act, which merely carried out the interpretation which the Courts had previously given to that Act ever since the *Dahn* v. *Davis* decision. That this was merely a restatement of recognized existing law, appears clear from the remarks on the floor of the Senate, when this bill was adopted. Senator Thomas, introducing the bill, stated:

> "The bill was given careful consideration by both the House committee and the Senate committee. It was carefully studied. It does not add to the law of the land, nor does it take away from the law of the land. * * *"

Senator George made a similar statement, as follows:

> "I looked into the bill, made some examination of it, and gave it some scrutiny to see whether it was a mere codification or clarification, and was intended to be that only, without adding any new laws. I reached the conclusion that it was, just as the Senator from Utah has stated" (90 Cong. Rec. Part 5 (78th Cong., 2nd Session), page 6486).

In addition, House report 1364, of the Committee on Interstate and Foreign Commerce, which accompanied the bill, stated at page 1:

> "It proposes to bring together, in a compact and orderly arrangement, substantially all existing law on the subject except obsolete provisions; to repeal obsolete laws; to resolve certain ambiguities in existing law; and to make a number of revisions which operating experience has shown to be necessary or desirable."

At page 30 of the report, reference is made to section 605, which amends the very sections of the U. S. Employees' Compensation Act involved herein, by inserting an express provision calling for an election, the report stating:

> "Subsection (a) amends section 7 of the Compensation Act so as to require an election between benefits under this act and any other benefits payable by the United States by reason of the same death or injury, if the benefits are based on services as a Federal Employee."

In *Parr* v. *U. S.*, 172 F. 2d 462 (C. A. 10th, 1949), a shoreside civilian employee of the War Department filed suit under the Federal Tort Claims Act, alleging injuries sustained by the negligence of other government employees. The government claimed that the Fedral Employees' Compensation Act was his exclusive remedy. In repudiating that contention, and in holding that such a government employee had a right of election, the Court stated at pp. 463-464:

(2) "When the Federal Tort Claims Act became effective, appellant had two remedies, each for the same wrong, and both against the United States. One was under the Employees' Compensation Act, and the other was under the Tort Claims Act. He then had the option to select either remedy and follow it through."

To the same effect, see also, *Canon* v. *U. S.*, 188 F. 2d 444 (C. A. 9th, 1951). Both of those cases arose prior to the 1949 amendment to the Compensation Act.

The arguments made by the government, as to alleged distinctions regarding applicability of the Compensation Act, or the right to elect to sue for damages, are completely undermined by the foregoing, as well as by the authorities cited in the Petitioner's original brief.

II

In *Thomason, et al.* v. *U. S.*, 184 F. 2d 105 (C. A. 9th, 1950), seamen employed on Army tugboats, filed suit for wages under the Tucker Act. The government successfully contended that such suit should be filed under the Public Vessels Act. In its opinion, the Court stated at pp. 107-108:

"As we read the decisions dealing with the Public Vessels Act, there seems to have been an increasing recognition of the greater breadth of its scope as different jurisdictional questions have been presented. It was at first thought to apply almost exclusively to collision cases. See, O'Neal v. United States, D. C. E. D. N. Y., 1925, 11 F. 2d 869; Dobson v. United States, 2 Cir., 1928, 27 F. 2d 807. This theory has been discarded and we find jurisdiction to have been upheld in a case involving property damage caused by the negligent operation of a public vessel by its crew. Canadian Aviator, Ltd. v. United States, 1945, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901. In this case it was said that 'the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as if

imposed by the admiralty law on the private shipowner * * *.' 324 U. S. 228, 65 S. Ct. 646. In the case of American Stevedores, Inc. v. Porello, 1947, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, recovery was awarded to a stevedore who had been injured while working aboard a public vessel in port by the fall of a beam which, through the negligence of the United States, had not been securely locked in place. The case of United States v. Loyola, 9 Cir., 1947, 161 F. 2d 126, held the Public Vessels Act sufficiently broad to cover an action for maintenance and cure by a seaman who had contracted tuberculosis during a voyage on a public vessel. See also, Mandel v. United States, D. C. E. D. Pa., 1947, 74 F. Supp. 754. Finally, the Act has been held to cover wage claims similar to those asserted in the instant case. Jentry v. United States, D. C. S. D. Cal., 1947, 73 F. Supp. 899.

The sustaining of jurisdiction under the Public Vessels Act in other than collision cases is in accord with the evident purpose of Congress to provide for the adjudication of seaman controversies in the admiralty courts. Pursuant to that purpose, Congress has passed two complementary jurisdictional statutes, the Suits in Admiralty Act for cases where the public vessel involved is employed as a merchant vessel, and the Public Vessels Act where the vessel is employed exclusively as a public vessel. It is a rational interpretation to say that in providing a forum for the adjudication of maritime claims uniformity was sought.

* * * * * * *

If the Tucker Act were held to be available to seamen on public vessels, they would enjoy a six-year statute of limitations, while seamen on United States merchant vessels would be restricted to a two-year limitation. Each case would require a determination of whether or not the ship at the time was 'operated as a merchant vessel', a distinction both difficult of proof and insignificant to the merits of the seaman's claim. Such an arbitrary departure from uniformity was not intended."

The government apparently realizes that its arguments (based on the history, statutes and interpretations of those

statutes involved herein) are unsound. It therefore attempts to bring itself within the ruling of the *Feres* case, in order to justify a dismissal of the suit. The government thus concedes that a civilian seaman, employed by the government on a public vessel, has the right to bring a suit for damages under the Public Vessels Act, but contends that such a suit must, nevertheless, be dismissed, on the ground that it would not constitute a cause of action on the merits, as a matter of law. We think that it misreads the *Feres* opinion.

In *Feres* v. *U. S.*, 340 U. S. 137, 71 Sup. Ct. 153 (1950) this Court held that the Federal Tort Claims Act gave the Court jurisdiction to entertain a suit by a soldier, injured in the line of duty, but that the provisions of that particular Act were such that there could be no right of recovery in that case on the merits. The reason was that the Federal Tort Claims Act provided that the government was to be liable in the same manner and to the same extent "as a private individual under like circumstances", and in accordance with "the law of the place where the act or omission occurred." The opinion pointed out that no private individual had the right to conscript an army, that no local substantive law could apply to a soldier injured while on duty, and that Federal law also recognized no right of recovery such as the injured soldier sought. It was therefore held that there was no reason to conclude that Congress intended to create a new cause of action dependent upon local law, so as to award damages for injuries sustained by military personnel in the line of duty.

On the other hand, here we have a situation in which the Public Vessels Act, like the Suits in Admiralty Act, governs the rights of the petitioner, so as to give him a cause of action against the government under federal law, to recover damages for personal injuries resulting from negligence or unseaworthiness.

CONCLUSION

The government has sought to make comparison between the benefits which would be received under the Compensation Act, as compared with other modes of relief. We feel that adequacy or inadequacy of the benefits to be derived from any Compensation Act, as compared with the benefits to be derived in a suit for damages would seem to be a matter for the consideration of Congress, rather than for the Courts. Suffice it to say that every Compensation Act introduced for the purpose of eliminating the right of seamen to sue for damages, has been uniformly opposed by labor, and defeated in Congress. If the government wishes to eliminate the right of election which these seamen have, it must address itself to Congress.

The right of election which has been recognized since the decision in the *Dahn* v. *Davis* case, and which was expressly placed into the Compensation Act by the amendment of 1944, and the legislative history affecting the rights of seamen, require that the decision of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

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LOUIS R. HAROLDS,
Of Counsel
and
on the Brief.

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No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The court below has held (191 F. 2d 162) that recovery may not be had under the Public Vessels Act for the injury in the service of his ship of a civil-service employee, serving as a member of the civilian component of the crew of a public vessel of the Army Transport Service. In *Feres* v. *United States*, 340 U.S. 135, this Court held that recovery for service-incident death, injury, or illness of military-service employees may not be had under

the Federal Tort Claims Act. The question of whether the same rule applies to recovery for similar service-incident death, injury, or illness of civil-service employees serving on public vessels remains open and has given rise to divergent views in the lower federal courts. In addition to the instant case, recovery has been denied by the Court of Appeals for the Third Circuit in *Mandel* v. *United States*, 191 F. 2d 164 (in which a petition for a writ of certiorari has been filed, No. 414, this Term). We regard these decisions as correct. The question has been decided in precisely the opposite manner, however, by the Court of Appeals for the Fourth Circuit in *Johnson* v. *United States*, 186 F. 2d 120; cf. *United States* v. *Marine*, 155 F. 2d 456.[1]

The question is of undoubted importance. Civil-service crew members employed on public vessels of the United States, unlike those on government

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[1] We do not regard *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9), as necessarily conflicting. There the Government argued successfully that, while the court had jurisdiction under the Public Vessels Act to determine the existence of a cause of action, the libellant had no cause of action for maintenance. Cf. *Feres*, *supra*, at pp. 140-141. The existence of a cause of action was precluded both because libelant had refused Government medical treatment and also because, although he forfeited compensation during such refusal, his fundamental right to compensation still precluded recovery. Since our contention that refusal of treatment precluded recovery was upheld, the court, correctly in our view, had no occasion to reach the question of whether libelant, although he had forfeited his compensation right, might nonetheless be precluded from recovery by his basic right to compensation.

merchant vessels operated by the Maritime Administration and its predecessors, the Shipping Board and the War Shipping Administration, are entitled to the benefits of the Federal Employees' Compensation Act for service-incident illness, injury, or death.[2] Such public vessel seamen, all but an insignificant number of whom are employed by the armed services as members of the civilian component of the crews of hospital ships, troop transports, and similar vessels, are not seamen in the ordinary sense of merchant seamen any more than are the members of the military component of the same crews. They are ordinary crew members of military vessels, frequently operating in the presence of the enemy, and are regular government employees entitled to all the benefits of the retirement, paid leave, disability, and death compensation statutes applicable to other members of the civil and military service. Public vessel seamen, if allowed both the right

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[2] Merchant vessel seamen employed by the Maritime Commission and the Shipping Board were excluded from the benefits of the Federal Employees' Compensation Act under decisions of the Comptroller General founded on the view, ultimately upheld by this Court in *Johnson* v. *U. S. Fleet Corporation*, 280 U. S. 320, that merchant seaman employed by the United States have their exclusive recovery against the United States for illness, injury, or death under the Suits in Admiralty Act. See cases collected in *Gibbs* v. *United States*, 94 F. Supp. 586, 589, fn. 9 (N. D. Calif.) and referred to in the *Mandel* opinion (fn. 15, 191 F. 2d at 168). Merchant vessel seamen of the War Shipping Administration and the present National Shipping Authority have the same status by reason of the Clarification Act (57 Stat. 45; 50 U. S. C. App. 1291(a)).

of recovery by suit, which is given government-employed merchant seamen, and the right to compensation benefits, which is given regular military and civil-service employees of the Government, would enjoy a privileged position far superior not only to military-service employees but also to merchant seamen, both government and private alike, who have only the right of suit but enjoy no right to compensation. Equally important, as pointed out by the court in the *Mandel* case, *supra*, is the security aspect of permitting recovery by suit for service-incident injuries of public vessel seamen of the armed services.

While we thus regard the decision of the court below as correct, we believe that the conflict among the circuits and the importance of the question call for an authoritative decision by this Court. We therefore do not oppose the granting of the petition.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER, 1951.

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[3] Nor, as stated in a separate memorandum being submitted simultaneously herewith, do we oppose the granting of the petition in the *Mandel* case, No. 414, this Term.

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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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3. Election by public vessel crew-members would discriminate inequitably against merchant seamen
4. Election by the civil service component of Army and Navy vessels would discriminate inequitably against their fellow crew-members
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IV. By the Compensation Act Amendments of 1949 Congress left for final resolution by the courts the preexisting conflict of decision as to whether public vessel crew members and other regular civil service employees who enjoy compensation and related benefits also have a right of action for service-incident injury, sickness, or death

A. The conflicting cases prior to the 1949 Amendments

B. The legislative history of the proviso excepting crew-members from the exclusiveness provision of the bill which became the Federal Employees' Compensation Amendment Act of 1949, establishes that Congress did not intend to alter the preexisting law relating to exclusiveness

Conclusion

Appendix

CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 414

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 401, the *Johansen* case, the opinion of the District Court for the Southern District of New

York (JR. 11) [1] is reported at 1951 A.M.C. 117. The opinion of the Court of Appeals for the Second Circuit (JR. 15) is reported at 191 F. 2d 162.

In No. 414, the *Mandel* case, the opinions of the District Court for the Eastern District of Pennsylvania (MR. 23, 61) [1] are reported at 74 F. Supp. 754 and 93 F. Supp. 692. The opinion of the Court of Appeals for the Third Circuit (MR. 100) is reported at 191 F. 2d 164.

JURISDICTION

In No. 401, the judgment of the Court of Appeals was entered on July 30, 1951 (JR. 18), the petition for a writ of certiorari was filed on October 26, 1951, and was granted on January 2, 1952 (JR. 19). In No. 414, the judgment of the Court of Appeals was entered on August 16, 1951 (MR. 109), the petition for a writ of certiorari was filed on November 6, 1951, and was granted January 2, 1952 (MR. 110). In both cases, the jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether members, or dependents of members, of the civil service component of crews of military transport vessels have a right of action against the United States for sickness, injury, or death in the performance of duty or whether they must accept as their sole recovery the benefits of the federal compensation, paid leave, and retirement provisions applicable to them.

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[1] Throughout this brief the abbreviation "JR." refers to the *Johansen* record, the abbreviation "MR." to the *Mandel* record.

STATUTES INVOLVED

The pertinent provisions of the Public Vessels Act of 1925, of the Federal Employees Compensation Act of 1916, as amended, and of the Federal Employees Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are set forth in the Appendix, *infra*, pp. 94-102.

STATEMENT

In these two cases, the respective petitioners, after accepting certain benefits under the Federal Employees Compensation Act, brought suit under the Public Vessels Act, claiming a right of action against the United States for injury and death in the performance of duty as members of the civil service component of the crew of military transport vessels. The cases thus involve the common question of the rights of members (and their dependents) of the civil service crew of transport vessels of the armed services who sustain service-incident sickness, injury, or death. In each case, the Government's sole contention is that petitioners have no right of action against the United States because the compensation and related benefits which are available to such civil service crew members are exclusive. The cases are therefore briefed together.

The principal difference in the two cases lies in the fact that in No. 401, the *Johansen* case, petitioner was aboard an Army transport engaged in a routine peacetime military operation in New York harbor and not in warlike operations, while in No.

414, the *Mandel* case, petitioner's decedent met his death aboard an Army transport tug boat engaged in warlike operations in the presence of the enemy. Although this difference is not significant, in our view, to the decision of the basic question, the underlying facts and the progress of the cases through the lower courts differ:

No. 401, *Johansen*. The facts may be summarized from the compensation record.[2] Petitioner Johansen was a carpenter in the civil service component of the crew of the Army Transport *Kingsport Victory*. On August 5, 1949, he sustained a lacerated leg in the course of his duties aboard the vessel which was lying at a pier at the Bethlehem Shipyard, Brooklyn, N. Y. Petitioner's own account of the accident, as contained in his affidavit of claim (photostat 14 of exhibits, cf. photostat 11), is as follows: "I was engaged in dismantling wooden sheathing in lower #4 hold. I was prying timbers from bulkhead. After reaching a height of approximately seven feet, I pried out some vertical timbers in order to leave the remaining timbers fall to the deck, and the sheathing collapsed." Petitioner was admitted to the Marine Hospital that day as a beneficiary of the Bureau of Employees Compensation, was treated until October 24, 1949, and was returned to duty November 7, 1949. In accordance with sections 7 and 8 of the Federal Em-

[2] The exhibits which were filed in the District Court (JR. 14) have not been printed but they have been transmitted to this Court as a part of the record.

ployees Compensation Act (5 U.S.C. 757, 758), petitioner elected not to take his sick or annual leave but to file claim for compensation benefits. An award was made him and he collected a total of $358.20. On February 6, 1950, petitioner filed a libel in admiralty (JR. 4), alleging that the United States was the owner and operator of the Army Transport, a public vessel of the United States, and that he and the other members of its crew "were in the employ of the respondent" when, on August 5, 1949, he was injured abroad the vessel "when certain lumber was caused to collapse, all by reason of the negligence of the respondent and the unseaworthiness of the vessel." Recovery of "damages, wages, maintenance and cure in the sum of $25,000" was claimed.

The Government answered (JR. 5) and moved for dismissal or hearing in advance of trial on the questions involving the Federal Employees Compensation Act (JR. 7). The answer denied the existence of any right of action (JR. 5-6), alleging that petitioner was an employee of the United States entitled to the benefits of the Federal Employees Compensation Act, that he had filed a claim and obtained compensation payments under that Act thereby electing its benefits, and that in any case petitioner's rights under the Compensation Act were exclusive and he had no right of action maintainable by suit under the Public Vessels Act (JR. 6). Negligence, unseaworthiness, and any right of recovery were further denied, and the

negligence of the petitioner and his assumption of risks were pleaded (JR. 6). An affidavit of Government counsel (JR. 8), supporting the motion for a preliminary hearing, summarized the facts from petitioner's compensation file which was to be produced upon the hearing. Petitioner filed in turn a motion, returnable the same day as that of the Government, demanding production of petitioner's compensation file, including all medical and accident reports as well as other papers (JR. 9-11). An accompanying affidavit of petitioner's counsel asserted, *inter alia*, that petitioner was never made aware of his "right" to sue under the Public Vessels Act, did not understand that acceptance of compensation benefits constituted a waiver of any other rights, and could not therefore "elect" to receive compensation benefits (JR. 10).

The matter was heard by Judge Conger, who after hearing counsel and considering their affidavits, made orders denying petitioner's motion for production as moot (JR. 11), granting the Government's motion, and dismissing the libel (JR. 12).

Judge Conger also filed a memorandum of opinion (JR. 11), stating that "It is plain that the [Federal Employees Compensation] amendments of 1949 were not intended to change the prior rights of seamen except to the extent of further coverage under the Act". He rejected the argument that petitioner "could not have 'elected' because he was unaware of an alternative", holding that his filing

a claim and receiving compensation was effective to preclude him. Petitioner's proposed counter order (JR. 13), including proposed additional findings as to the Government's failure to advise petitioner concerning his rights and the absence of any final adjudication of his claim for compensation, was rejected.[3]

On appeal, the Court of Appeals for the Second Circuit affirmed in an opinion by Judge Chase, joined in by Judge Learned Hand. Decision was rested on the ground that compensation is exclusive where injury is in line of duty, so that members of the civil service component of the crew of Army Transports who are injured in the course of routine military operations have their exclusive rights against the United States under the Federal Em-

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[3] At the hearing of the motions, petitioner's counsel had argued that the compensation payments were voluntary and without final adjudication. Government counsel explained that the statute does not require formal hearings or formal documents for awards, and such formal proceedings are not had on uncontested claims. The "consideration of the claim" the "findings of facts" and the "award" required for final adjudication by section 36 of the Act (5 USC 786) are all included in the second and third "blocks" of the Summary Sheet Form CA 25 (photostat 1 of the exhibits).

In answer to inquiries from the bench, Government counsel also informed the court that the Government's position had always been that compensation and related benefits constituted the exclusive right of members of the civil service component of the crews of military vessels and that therefore no recovery could be had when suit is brought under the Public Vessels Act. Counsel stated that, in view of the Government's position and standing instructions, it might be presumed that petitioner was never advised that he had a right to elect as between compensation benefits on the one hand, and a suit for damages for personal injuries, on the other.

ployees Compensation Act (JR. 15).[4] The court explained (JR. 17) that since petitioner would have been limited to suit alone, if he had been employed on a private or Government merchant vessel, and to compensation alone, if employed in the military service, "allowing him but one means of recovery will appropriately fit 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole,'" citing *Feres* v. *United States*, 340 U.S. 135, 139. The court added (JR. 17) that "We should not, without clear warrant in the statutory language, attribute to Congress an intent to permit civilian members of the crew of such a vessel to have an election denied enlisted members of the crew. The first have their rights under the Federal Employees Compensation Act, the second their rights as enlisted men to be compensated for service-connected injuries; the first, no more than the second, have been given the right to elect to sue the government rather than to accept such compensa-

[4] The court stated "We understand that the parties agree that the transport was engaged in a military operation when he was, on August 5, 1949, hit by falling lumber and injured, allegedly because of the negligence of the appellee or because of the unseaworthiness of the vessel" (JR. 15). Although he did not move for rehearing below, petitioner now, for the first time, challenges this statement and asserts in his brief that the vessel was not so engaged (Br. 2). Petitioner until now never claimed that the vessel was engaged in a non-military or commercial operation. So far as the compensation file indicates, the Army Transport involved was engaged in an ordinary routine peacetime military operation and was at a dock at the Bethlehem Shipyard, Brooklyn, repairing between voyages. All our information is to the same effect.

tion." Judge Frank dissented, stating that in his view petitioner had a right of election and had not exercised it.

No. 414, *Mandel.* Libelant's decedent, Robert W. Dillehay, was Third Assistant Engineer of the United States Army Tug LT-221, which was permanently assigned to the Mediterranean Theater of Operations. On October 15, 1944, Dillehay, eight other members of the army crew, and two naval ratings from the navy liaison group aboard, met death in the presence of the enemy when the LT-221 was destroyed by a mine in attempting to enter the port of Cagliari, Sardinia.

Dillehay was survived by a widow and an infant daughter born February 13, 1943. On behalf of the daughter, the widow applied for and obtained an award of compensation under the Federal Employees Compensation Act. Monthly payments of $87.91 are being currently made to the widow on that account and will continue until the child dies, marries, or reaches the age of eighteen. Although she had signed a general release (MR. 82-83) in consideration of the payments made the child, the widow, on her own behalf, procured the appointment of an administrator who brought this suit for $150,000 against the United States under the Suits in Admiralty Act.

Petitioner's libel (MR. 3) alleged that the United States owned and operated "the tug LT-

221 as a merchant vessel in foreign commerce" and Dillehay was employed as a member of its crew when on October 15, 1944, while the vessel was "at or near the port of Cagliari, Sardinia", the vessel suffered a violent explosion and he was killed. Negligence of the United States was alleged both in respect of the operation of the vessel and of the mine-control installations and procedures of the military authorities of the port.[4a] The following particulars were specified, among others (MR. 4-5):

> (b) failing to direct the course of the vessel in such a manner so as to avoid the mine field or other dangerous area, the existence of which the respondent knew or should have known;
>
> * * * * *
>
> (d) failing to provide, maintain and operate a proper and adequate degassing device or system, or other anti-mine machinery and equipment;
>
> * * * * *
>
> (f) causing the explosion as aforesaid;
>
> (g) failing to provide, maintain and operate proper and adequate warning and signal devices;
>
> (h) failing to give plaintiff's intestate prompt and adequate warning of his danger under the circumstances; * * *.

[4a] Cf. the statement of the Secretary of War: "The vessel was engaged exclusively in a military operation in time of war when it was sunk in the gulf of Cagliari in a minefield in a forward combat area" (MR. 64).

The Government objected to the libel by means of exceptions (MR. 6), exceptive allegations (MR. 8), and a motion to dismiss (MR. 10), all setting forth (1) that the vessel was a public vessel of the Army and there was no jurisdiction under the Suits in Admiralty Act, (2) that the right to compensation benefits was exclusive of any right of action under the Public Vessels Act, and (3) that the widow's acceptance of compensation benefits on account of her daughter precluded her from suit.

The District Court rejected the Government's objections, holding that the Suits in Admiralty and Public Vessels Acts should be read together so as to give crew members of every type of Government vessels the same rights. It stated that, except for members of the military component, "a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government" (MR. 26, 74 F. Supp., at 755). The United States then answered (MR. 28), denying negligence and jurisdiction and pleading (1) that the right to compensation was exclusive and there was no right of action, (2) that the acceptance of compensation precluded suit, and (3) that recovery was barred by the execution of a special release.

In due course, interrogatories (MR. 31) were served and answered by the United States (MR. 33). The answers furnished the names and addresses of all witnesses and copies of all known

statements, reports, and documents relating to the case except the Report of the Army Board of Investigation (which includes the transcript of the testimony it heard). Although the Army had taken appropriate action under the Public Vessels Act (46 U.S.C. 784) to authorize petitioner to interview and subpoena the master of the tug (MR. 92), a motion for the production of the Army Board's Report was made (MR. 38) and sustained by Judge Kirkpatrick as to all except the testimony of the master (MR. 61, 93 F. Supp. 692). The evidence before the Board included, of course, testimony relating primarily to the conduct of military operations by military personnel (MR. 64). The United States moved for a rehearing (MR. 69), filing a formal claim of privilege by the Secretary of the Army (MR. 64), documents relating to the vessel's status (MR. 65-68), and to the compensation award (MR. 73-88). Judge Kirkpatrick denied the motion and entered an interlocutory decree of default against the United States (MR. 90, 98), holding it liable on the merits and ordering further proceedings to assess damages.

On appeal, pursuant to 28 U.S.C. 1292 (3), from the interlocutory decree the Court of Appeals for the Third Circuit unanimously reversed in an opinion by Judge Goodrich (MR. 100). It held that it was not necessary to decide the discovery question (MR. 102) since it concluded that the right to compensation and related benefits was ex-

clusive of any right of action which could be asserted by suit against the United States (MR. 103). It stated three reasons for this conclusion. (1) "It is the general rule that unless the [Compensation] act is by its terms optional, remedies provided by the act are exclusive when the act is applicable" (MR. 103). Exclusiveness of compensation will alone remove unfair discrimination. (2) It would be discriminatory to give members of the civil service component of the crew of military transports both the right to compensation benefits which is exclusive for the military component of such crews and denied to War Shipping Administration seamen, and also give them the right of recovery by suit which is exclusive for War Shipping Administration seamen and denied to the military component. "We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate" (MR. 104-105). (3) Some of the cases which might arise could involve the conduct of military or semi-military operations. "It will not, we think, aid in the operation of the armed forces if the propriety of a commander's judgment is to be tested months or years afterwards by a court or a court and jury" (MR. 105). By way of example, the court referred to petitioner's attempt to discover the testimony before the Army Board of Investigation regarding the functioning of the military procedures involved (MR. 105-106).

SUMMARY OF ARGUMENT

It is agreed that the problem of whether petitioners can recover under the Public Vessels Act is not one of jurisdiction. As the court below observed in the *Mandel* case, No. 414, "May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained * * *" (MR. 103). The issue is one of right of recovery under the Public Vessels Act, as against exclusiveness of the compensation benefits to which petitioners are admittedly entitled. This problem is not confined to members of the civil service component of the crews of armed forces vessels. They are, indeed, the principal group but the question extends to the employees of every Government agency operating water craft. The crew of a patrol launch are public seamen during their performance of that duty, even though the majority of the time they are shoreside employees. Many public vessel civil service crew members are in the Fish and Wild Life Service, the Coast and Geodetic Survey, the Immigration and Naturalization Service and similar agencies. The general question of exclusiveness affects, moreover, all regular shoreside employees who filed suits against the United States before the Compensation Act amendments of 1949 (expressly declaring compensation benefits exclusive for the future[5]), and all

[5] The 1949 amendments also leave for judicial decision the question of exclusiveness for crew-members, such as petitioner Johansen and petitioner Mandel's intestate. *Infra*, pp. 19-22.

Government employees, such as Park Police, whose compensation is not under the Federal Employees' Compensation Act but under other special statutes not affected by the 1949 amendments.

I

Public vessel crew members—who are entitled to all the benefits of regular civil service employees, including compensation, paid annual and sick leave, retirements annuities and all related rights—should not be confused with merchant seamen who, whether employed by private operators or by the War Shipping Administration and its successor the National Shipping Authority, are excluded from compensation and the related benefits and have a right of action against their employer as their exclusive remedy for injury, illness, or death in the performance of duty.

Much of petitioners' argument is vitiated by their failure to recognize this distinction which exists between the rights of merchant seamen and those of public vessel seamen. Aside from the difference in the rights which Congress has given the two groups, there are fundamental distinctions in the nature and purpose of merchant vessels and public vessels. Thus, military transport vessels are auxiliaries to the fleet and are employed in military operations. They consist of hospital ships, troop transports, tug boats in combat areas and all such types of auxiliaries. They are manned by mixed crews of civil and military service per-

sonnel and all are subject to the same military discipline. The importance of not litigating matters effecting injury, sickness and death in the performance of duty is the same whether the individual involved is in the civil or military service component of the crew.

Merchant seamen have always been excluded from compensation and have insisted on that treatment. Public vessel seamen appear to have been of the contrary view. The difference in attitude probably lies in the fact that compensation under the Federal Employees' Compensation Act is more liberal than under other compensation statutes, not only as to amount but also as to coverage. While other acts contain the litigiously prolific phrase "arising out of and in the course of employment", the Federal Employees' Compensation Act says only that the injury must be "sustained while in the performance of his duty". Since under this Court's decisions everything a crew member does in the service of the ship is in the performance of his duty, the statute authorizes the broadest relief.

II

In 1943, Congress settled by the Clarification Act that seamen employed on merchant vessels of the War Shipping Administration (now the National Shipping Authority) should have their exclusive rights for service—incident injury,

sickness, and death by suit against the United States and should be excluded from all compensation, retirement, and related benefits. The discussions had in Congress at that time evidence a clear understanding that public vessel seamen have compensation, paid leave, and retirement benefits as their exclusive right while the exclusive right of WSA merchant seamen, like those in private employment, should be a right of action against their employer, the United States. This enactment was merely declaratory of the pre-existing law, as construed administratively and by the lower courts.

III

Construing the Public Vessels Act of 1925 and the Federal Employees' Compensation Act of 1916 together, in the light of their history and the consequences of the different interpretations urged by petitioners and the United States, shows that the Congresses which enacted them did not intend to give public vessel crew members an election between their right to compensation, paid leave, and retirement benefits, on the one hand, and a right of action for damages, unseaworthiness, maintenance, cure and wages, on the other. The Public Vessels Act, in granting jurisdiction of libels "for damages caused by a public vessel", did not impliedly create a new right of action in public vessel crew members who already enjoyed a right to compensation and related benefits. The distinction be-

tween jurisdiction and a right of action is fundamental and the grant of jurisdiction does not imply the creation of a right of action.

Prior to the Public Vessels Act, jurisdiction for suits for unseaworthiness, maintenance, cure and wages was available under the Tucker Act of 1887, since such claims rest upon the implied contract of the Government as ship operator, but no such suits had ever been brought, presumably because compensation was exclusive and no such right of action existed. Nothing in the history or purpose of the Public Vessels Act indicates an intention to create such a right of action.

The language of the Federal Employees' Compensation Act of 1916 and in particular its detailed provisions respecting the right of election of its beneficiaries between compensation and paid sick and annual leave, retirement annuities and other benefits, shows that Congress intended compensation to be exclusive, except as provided in that Act. Although jurisdiction existed under the Tucker Act for suits for unseaworthiness, maintenance, cure and wages, no such suits had been brought before 1916 and Congress appears not to have regarded any such right of action as existing in favor of public vessel crew members.

Implying a new right of action in addition to a right to compensation would have five consequences which Congress would not seem to have intended. *First,* a right of election would be unworkable in the absence of express statutory provision, because

crew members, as wards of the admiralty, are often not held to an election. *Second,* to imply a right of election would be inconsistent with the established rule respecting compensation statutes that, except where election is provided for, compensation is always exclusive. *Third,* election would discriminate unfairly against merchant seamen who are expressly denied compensation and have as their exclusive recovery their right of action against their employer. *Fourth,* election would discriminate unfairly against members of the military component of the crew of public vessels who are confined to their disability compensation and pension rights for all service-incident injury, sickness, or death. *Fifth,* election to proceed by suit might in some instances, such as the *Mandel* case, No. 414, result in judicial interference with military responsibility, requiring the Government to litigate the question of the due care of a military commander in the presence of the enemy.

The plain language of the two statutes, their history, and the consequences of the right of election advocated by petitioners, show that Congress, in not making any provision as to election between the right to compensation and a right of action, intended compensation to be exclusive.

IV

By the Federal Employees' Compensation Act Amendments of 1949, Congress left for final resolution by this Court the pre-existing conflict of

decisions regarding the exclusiveness of compensation. Four circuits have now held compensation to be exclusive in the case of a federal employee eligible to compensation. The Second and Third Circuits have done so in the present cases involving public vessel crew members. Two other Circuits have so held with respect to shoreside employees. *Lewis* v. *United States,* 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869; *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C.A. 5). Only the Fourth Circuit is in square conflict. *United States* v. *Marine,* 155 F. 2d 456; *Johnson* v. *United States,* 186 F. 2d 120.

At the time the 1949 amendments were proposed four seamen's cases had considered the question of the exclusiveness of compensation, paid leave, and retirement benefits pursuant to the Federal Employees' Compensation Act. Two of the cases had held it exclusive. *O'Neal* v. *United States,* 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2); *Lopez* v. *United States,* 59 F. Supp. 831 (S.D. N.Y.). The Second Circuit, by *dicta* in cases involving members of the regular military component of the crew of public vessels, had approved these holdings. The District Court below in the *Mandel* case had held benefits under the Federal Employees Compensation Act were not exclusive. The Ninth Circuit had agreed with the Government that there was jurisdiction but had not reached the question of exclusiveness.

The purpose of the declaratory amendment to section 7 of the Compensation Act (5 U.S.C., Supp. IV, 757) making it clear that the right to compensation benefits is exclusive was to resolve the conflict in the decisions. After the bill had passed the House and was favorably reported in the Senate, the seamen's unions became fearful that it might deprive them of some rights. Senator Morse offered a floor amendment, preserving the *status quo*. The total effect of his amendment, as he himself stated, was to "make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen" (95 Cong. Rec. 13608). He further explained that the amendment made special provision for late filing of claims for compensation if suits were dismissed among other reasons "because the remedy under the Compensation Act is exclusive" (95 Cong. Rec. 13609).

Senator Douglas, who was in charge of the bill, accepted the Morse floor amendment subject to a statement in which he emphasized that because no hearings had been held on the point the *status quo* was being preserved. He said, "we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court" (95 Cong. Rec. 13609).

This judicial and legislative history of the question shows that Congress has left the determination of the effect of the original Compensation Act of 1916 to this Court.

ARGUMENT

Introductory

The Government does not question that injured Government employees, whether in military or civil service, can bring suits against the United States under the Tort Claims, Public Vessels, or Suits in Admiralty Acts if they have a cause of action for damages for their injuries.[6] The sole question is whether there is such a right of action or whether federal employees' compensation, when available, is exclusive. The general problem is, as the court below observed in the *Mandel* case, "May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained * * *" (MR. 103). Or as this Court observed in *Feres* v. *United States* (340 U.S. 135, 140-141), with respect to the Tort Claims Act: such acts confer "jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to

[6] The Tort Claims Act contains certain specific exceptions and limitations (see 28 U.S.C. 2680) which are not expressly applicable to the two admiralty statutes. Cf. *infra*, p. 76.

adjudge that liability exists. [By virtue of the Act,] Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."

The issue in this type of case is, generally, whether a person who admittedly has a right to receive compensation and related benefits from the United States also has a right of action against the Government for sickness, injury, or death in the performance of duty—a right of action which may be asserted by suit under whichever of the various jurisdictional statutes is otherwise applicable. This problem is not confined to members of the civil-service component of the crews of armed forces vessels, even though they are the principal group now affected. For the future, the problem has been definitely solved as to the mass of federal employees by the 1949 amendments to the Federal Employees' Compensation Act (Act of October 14, 1949, c. 691, 63 Stat. 854), in which Congress announced in express terms the exclusiveness of compensation under that Act (*infra*, pp. 100-102). But at the same time Congress left to the courts whether the amendment was purely declaratory or altered the pre-existing law. It left for ultimate judicial decision and expressly excluded from the effect of the 1949 declaration, *first*, all cases of every kind which had been previously instituted,

second, all cases involving masters and members of crews of vessels;[6a] and, *third,* all cases involving members of the United States Park Police and the members of the military services were left for consideration by the courts since the compensation statutes applicable to those persons, like the Federal Employees' Compensation Act prior to the October 14, 1949 amendments, contain no express declaration as to whether the right to compensation is exclusive. See *Feres* v. *United States,* 340 U.S. 135 (compensation exclusive for military personnel); *Lewis* v. *United States,* 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869, rehearing denied, 342 U.S. 899 (compensation exclusive for United States Park Police). Thus, the problem is of somewhat wider scope than the particular situations directly involved in the two cases now at bar. The dominant considerations, however, stem from the circumstances in cases like the two before the Court, involving civil service members of mixed crews on military transport vessels which may frequently be employed in warlike operations.

[6a] The 1949 amendments declared that the subsection providing in terms for the exclusiveness of compensation "shall not apply to a master or a member of the crew of any vessel." See *infra,* p. 100. In addition to civil service crew-members of military transports, a few civil service employees of other agencies such as the Coast and Geodetic Survey and the Army Engineers are affected. Moreover, employees of the Fish and Wildlife Service, the Immigration and Naturalization Service, and of numerous other agencies which operate patrol and inspection launches and similar craft, equally become, during that part of their service which is

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The Public Vessel Crew-Members Here Involved Are Entitled to Federal Employees' Compensation and Related Benefits and Have a Different Status from Federally-Employed Merchant Seamen Who Are Excluded from Such Compensation and Whose Right of Action under the Suits in Admiralty Act Is Their Sole Remedy for Injury, Sickness, or Death

Much of the argument of both petitioners is founded on the contention that members of the civil service component of the crews of military transport vessels are merchant seamen, the same as the crew-members of merchant vessels of the War Shipping Administration (WSA), its predecessor the Shipping Board, and its present successor the National Shipping Authority (NSA). In fact, however, the merchant seamen on those vessels have never enjoyed the same rights under the federal disability compensation, paid sick and annual leave, civil service retirement acts, and related statutes which crew members of public vessels enjoy. The exclusive right of such merchant seamen for injury, illness, or death in the service of the ship is by suit for damages, maintenance and cure against their employer. They have been expressly excluded from the benefits of the Federal Employees' Compensation Act and related benefits. While this exclusion has since 1943 been

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aboard such public vessels, masters or members of crews, although during most of their service they are shoreside employees.

effected by statute, it was formerly the rule by administrative and judicial decision (see *infra*, pp. 32-35).

Other aspects of petitioners' arguments appear grounded on the related erroneous assumptions *first*, that although Congress made separate provision for the two classes of ships in the Suits in Admiralty and Public Vessels Acts, there is no difference between public vessels of the United States and government merchant vessels so long as the members of the crew of public vessels are not all in the military service and, *second*, that military transport vessels, vessels of the Coast and Geodetic Survey, of the Fish and Wildlife Service, and of the Army Engineers are no different from government owned merchant vessels engaged in the carriage of commercial cargo.

We submit that all of petitioners' elaborate citation of cases and argument, based upon the right of merchant seamen on such WSA/NSA merchant vessels to recover damages, or maintenance and cure, by suit against the United States under the Suits in Admiralty Act, is footless. It establishes no more than the familiar and conceded fact that such merchant seamen must of necessity recover in that way since, unlike crew-members of public vessels (whether in civil or military service), recovery by suit is the exclusive remedy of such merchant seamen and they would otherwise be without recovery.

But, in addition to this basic difference, the distinctions between merchant vessels and merchant seamen, on the one hand, and public vessels and their regular civil and military service crews, on the other, are too fundamental to be overlooked. Because the two cases now before the Court involve crew-members of military transport vessels and because such vessels and their crews are the most numerous and the nature and scope of their rights the most important, we shall use such vessels and their crews to illustrate the relevant differences between public vessels and government merchant ships.

1. The vessels of the Army Transport Service (now succeeded by the Military Sea Transportation Service of the Navy), whether hospital ships (*Lopez* v. *United States*, 59 F. Supp. 831 (S.D. N.Y.)), troop transports (No. 401, *Johansen*), or tug boats (No. 414, *Mandel*), are not merchant vessels but are auxiliaries to the fleet and are operated for the military function of transporting troops and their supplies in forward areas.[7] The operation of these vessels is an integral part of military operations both peacetime and warlike. They have crews consisting of both military and

[7] The carriage of civilian government employees, of dependents of military and civil service personnel, and of evacuees, together with the personal and household effects of such persons, is a secondary activity. When undertaken, it is solely in furtherance of the Government's interest, not for profit, and only when space would not be used for military purposes.

civil service components. Thus, on Army hospital ships, the deck and engine room force are civil service employees but the medical crew are in the military service.

The status of both the military and the civil service components of the crews of these vessels is similar; their rights and discipline are similar, except that the civilians are free to quit at the end of any voyage. The civil service public vessel crew-members, no less than their fellow crew-members of the military component, are subject to military law. "It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies." *Ex parte Falls,* 251 Fed. 415, 416 (D. N.J.); *Ex parte Gerlach,* 247 Fed. 616 (S.D. N.Y.). Disobedience of orders is an offense which, since unhesitating obedience is vital, may possibly be punished by death. See former Articles of War 64 and 65 (10 U.S.C. 1536, 1537); Articles 90, 91 of the Uniform Code of Military Justice (50 U.S.C., Supp. IV, 684, 685). Disrespect to a superior is an offense, even though no disobedience is involved. Former AW 63, AW 65 (10 U.S.C. 1535, 1537); Articles 89, 91 of the Uniform Code (50 U.S.C., Supp. IV, 683, 685). Still other provisions furnish the military with full authority to deal with negligent conduct. Former Article of War 96 (10 U.S.C. 1568) provided *inter alia* that "disorders and neglects to the preju-

dice of good order and military discipline, [and] all conduct of a nature to bring discredit upon military service" are offenses for which, as already explained, the civil service as well as the military components of the vessel's crew might be punished. Article 134 of the new Uniform Code of Military Justice (50 U.S.C., Supp. IV, 728) is to the same effect.

No question may be allowed as to the right of command and the duty of obedience. It is for that reason that the military authorities have absolute power of control, enforced by rigorous sanctions, over the civil service crew-members no less than those of the military component. Allowing access to the courts by suit to recover for injuries sustained by armed forces seamen in the execution of military orders would tend to shift this regulation and control from the military establishment to the courts, which would be required in the course of personal injury litigation to pass upon the propriety of military decisions and actions. Essential military descipline abroad transports, hospital ships, and tugs would be impaired by thus subjecting the military command to publice criticism and scrutiny at the behest of members of the civil service component of the crew.

Moreover, military transports travel into combat zones in time of war and frequently are in the presence of the enemy, as in the *Mandel* case, No. 414. So far as military security is concerned, the situation is precisely the same where vessels of

the armed forces are involved, regardless of whether the injury or death is that of a member of the civil service or of the military service component of the crew. Were suit to be allowed in cases such as *Mandel*, the United States might feel compelled, as in that case, to permit a default judgment to be entered against itself rather than to make disclosures inimical to the national security. (Cf. MR. 64-65.)

2. The civil service members of the crews of such Army and Navy vessels plainly have a different status from the merchant seamen on private vessels and the government-employed merchant seamen on vessels of the former WSA and its successor the NSA. Unlike WSA/NSA merchant seamen, such civil service crew-members on Army and Navy vessels are regular civil service employees of the United States taking the regular oath of office as public officers of the United States and enjoying not only the benefits of compensation but of paid sick and annual leave, cumulative from year to year, and full civil service retirement benefits. They are not employed by the voyage like private or WSA/NSA merchant seamen, but under long term contracts, permanent agreements of enrollment, or continuous shipping articles, for as many voyages as their vessel may make, subject to yearly renewal or termination.

3. For many years, there have existed decided differences between the attitudes of merchant sea-

men and public vessels seamen toward compensation legislation. For instance, private merchant seamen, at the time of the enactment of the federal Longshoremen's and Harborworkers' Compensation Act, wished to be excluded from that act no less than from the state compensation acts and to have their exclusive recovery by suit against their private employers.[8] Civil service crewmembers on Army and Navy vessels, on the other hand, had enjoyed the benefits of the Federal Employees' Compensation Act since 1916 and nothing in the discussions leading up to enactment of the Longshoremen's Act evidenced any desire of armed forces seamen to relinquish this protection which they enjoyed as federal employees.[9]

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[8] At the time of the adoption of the Longshoremen's Act the attorneys for the private seamen notified the committee that they preferred the Jones Act remedy. See Senate Committee on the Judiciary, Hearings on S. 3170, 69th Cong., 1st Sess., p. 17. At first the bill covered them. H. Rep. No. 1767, 69th Cong., 2d Sess. But they were later excluded, 68 Cong. Rec. 5402-5403, 5908.

In 1940-1941, in connection with the consideration of the Shipowners' Liability Convention of 1936, 54 Stat. 1693, the same course of events was repeated. Senate Committee on Commerce, Hearings on H. R. 6881, 76th Cong., 3d Sess. On September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for privately employed seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess.; 86 Cong. Rec. 12002. The agencies' report was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess.; 87 Cong. Rec. 7434. The change was vehemently opposed by the seamen's representatives and no further action was taken.

[9] The reasons for this difference in the attitude of the merchant seamen, on the one hand, and the public vessel seamen,

II

The Clarification Act of 1943 Was Based on the Assumption That Merchant Seamen on War Shipping Administration Vessels, Like Private Merchant Seamen, Should Have Their Exclusive Rights by Suit Against Their Employer, While Public Vessel Crew Members Should Have Federal Compensation Benefits Exclusively.

We believe that Congress, from at least 1943, was aware of the distinction between the nature and rights of merchant seamen such as those employed by the War Shipping Administration, on the one hand, and public vessel seamen of the Army and Navy, on the other. It was this awareness which led

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on the other, are not far to seek. *First*, while the compensation payments under both the Federal Employees' Compensation Act and the Longshoremen's Act have been increased, the benefits under the FECA have always been more liberal. At the present time, the injured harborworker's compensation is only two-thirds of his pay, but not to exceed in any case more than $35 per week (33 U.S.C., Supp. IV, 908, 906), but the civil service employee's compensation may amount to as much as $525 per month and is increased from two-thirds to three-fourths of his pay if he has dependents (5 U.S.C., Supp: IV, 754, 756). In case of death the advantage for a civil service employee is still greater. Under the FECA a wife receives 45 percent of the decedent's pay, a wife and one child 55 percent, and additional children 15 percent each, but not to exceed in all three-fourths of the decedent's pay or $525 per month (5 U.S.C., Supp. IV, 760). The widow of a privately-employed worker, on the other hand, receives only 35 percent of the decedent's wages taken at not to exceed $52.50 and each child 15 percent additional, but not to exceed in all the comparatively insignificant sum of two-thirds of $52.50 or a total of $35 per week (33 U.S.C. Supp. IV, 909).

Second, the Federal Employees' Compensation Act (contrary to petitioner Mandel, Br. 27-29), unlike the Harborworkers' Act, does not contain the litigiously prolific phrase "arising out of and in the course of employment." The FECA says only "sustained while in the performance of his duty" (5 U.S.C. 751). Since everything a crew-member does in the

to the enactment of the Clarification Act of 1943,[10] which confirmed in WSA merchant seamen the exclusive right of suit against their employer, the United States, which private merchant seamen enjoyed against their private employers, and left public vessel seamen to their compensation, paid sick and annual leave, retirement, and other civil service rights.

1. Before World War II, the prevailing administrative and judicial view was that Government merchant seamen were excluded from federal employees' compensation and had their exclusive

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service of the ship is in the performance of his duty (*Aguilar* v. *Standard Oil Co.*, 318 U.S. 724; *Warren* v. *United States*, 340 U.S. 523) the way is open for the broadest relief. See *infra*, pp. 43-44.

Third, compensation under the FECA (again contrary to petitioner Mandel, Br. 30-31) is a very great deal more than maintenance. Compensation like maintenance is paid for injury or illness in the service of the ship, regardless of fault or negligence. Unlike maintenance, compensation is payable even though the seaman is hospitalized and receiving full maintenance in kind. Compensation under the FECA is only limited by a statutory maximum of $525 per month (5 U.S.C., Supp. IV, 756(c)) and not, like maintenance, to the reasonable value of the seaman's quarters and subsistence. Since August 1948, the usual rate on maintenance under union agreements has risen to a maximum of $6.00 per day or $42.00 per week. Before August 1948, maintenance was still lower, usually only $4.50 per day. We are unaware of any awards against the United States (in WSA/NSA cases) at higher than $6. (Cf. petitioner Mandel, Br. 10, 30). In *Allen* v. *United States*, 1951 A.M.C. 1316 (S.D. Calif.), a crew-member of an Army Transport, who contracted tuberculosis in the service of the ship, was receiving compensation under the FECA at the rate of $89.71 per week. At $6 his maintenance would be $42. Compensation, depending on wages, might amount to as much as $121 per week.

[10] War Shipping Administration (Clarification) Act, March 24, 1943, 57 Stat. 45, 50 U.S.C. App. 1291.

rights by suit under the Suits in Admiralty Act.[11] Members of the crew of merchant vessels, whether privately operated or operated by the Maritime Administration and its predecessor and subsidiary organizations, the Shipping Board, the various Fleet Corporations, WSA and the present NSA, have always been excluded from compensation benefits. By contrast, public vessel crew members had had, since 1916 (when the Federal Employees' Compensation Act was passed), their exclusive rights under the Compensation Act and related legislation. See *infra*, pp. 42 *et seq.* When large-scale operation of merchant ship by WSA began in 1942, the question arose whether the mer-

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[11] The Attorney General had first held such merchant seamen not entitled to compensation (34 Ops. A.G. 120). Later he reversed himself (34 Ops. A.G. 363). The Comptroller General, however, ignored the change and continued to hold the right to sue under the Suits in Admiralty Act excluded the right to compensation. After this Court's decision in *Johnson* v. *Fleet Corp.*, 280 U.S. 320, he reaffirmed his view, citing that case and declaring (Decision A-31684, September 10, 1930): "While the Employees' Compensation Act was not mentioned nor considered, the conclusion seems justified that the remedy available to a member of a crew of a merchant vessel owned by the United States and operated by or for the Merchant Fleet Corporation, to recover for injury sustained during employment, is, also, exclusive of any right or remedy under the Employees' Compensation Act. * * * Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for operation of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is only reasonable to conclude that, under existing law, the Employees' Compensation Commission may not entertain, settle, or pay any claims under the Employees' Compensation Act by or on

chant seamen employed on such vessels would continue to have their sole rights under the Suits in Admiralty Act or whether they would be treated as public vessels crew members.

Fully aware of the difference in rights, Congress deliberately chose to affirm the rights of WSA seamen under the Suits in Admiralty Act, and to prohibit them from receiving compensation. Congress took this action because it was thought undesirable to assimilate the rights of the large number of merchant seamen (temporarily in government service in order to man the cargo vessels supporting the war effort) to those of the Army Transport and other public vessels seamen who were regular government employees under the Federal Employees'

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behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as a result of such injuries sustained in the course of their employment on such vessels."

Some of the cases involving the exercise by such merchant seamen of their exclusive right of recovery by suit are collected by petitioner Mandel (Br. 14), a smaller number are collected in *Gibbs* v. *United States*, 94 F. Supp. 586, 589, fn. 9 (N.D. Calif.), and are referred to in the Third Circuit's *Mandel* opinion (fn. 15, MR. 108). The insurance carriers on the government's merchant vessels were permitted to offer their crew-members voluntary settlement on the scale of the compensation benefits to which they would have been entitled if employed on Army and Navy vessels. See e.g. *Hillenbrand* v. *United States*, 1929 A.M.C. 885 (S.D. N.Y.); *Stewart* v. *United States*, 25 F. 2d 869 (E.D. La.). This was in full accord with the similar voluntary practice of insurance carriers on private commercial vessels. See e.g. *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (C.A. 1); *In re Panama Transport Co.*, 98 F. Supp. 114, 117 (S.D. N.Y.).

Compensation and Civil Service Retirement Acts.[12] In explaining to Congress the situation which induced WSA to ask for this legislation, its General Counsel stated:[13]

> As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security System; they and their dependents may recover damages for injury or death of seamen through the provisions of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocations of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impaired. In exchange for such lost privileges, these seamen acquire special privileges of Government employees such as right to compensation for injury under the United

[12] In February and March 1942, when War Shipping Administration was created and proceeded to requisition the American merchant fleet and inaugurate its plan for direct government operation, the entire merchant fleet was privately operated, employing some 55,000 seamen. Ninety percent of the 1,375 ocean-going vessels were privately owned. Ten percent were government-owned but were demised by the Maritime Commission for private operation. Less than 50 comparable public vessels, plus a few tugs and harbor craft, were operated by the Army Transport Service with civilian crews. On V-J day in August 1945, there were over 220,000 seamen manning some 4,300 vessels which remained of the 5,200 ships built by the Maritime Commission plus the original 1,375.

[13] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 14.

States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.

Seamen constantly interchange between time chartered vessels on which they are private employees, and bareboated or owned vessels on which the personnel becomes employees of the Government. The rights of seamen may thus change from voyage to voyage depending upon the particular status of the vessel upon which they happen to sail. In view of the interchangeability of seamen, this creates many administrative difficulties. Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters.

In the course of the consideration of the Clarification Act, it was emphasized again and again that merchant seamen employed on Government cargo vessels would have, exclusively, the ordinary merchant seamen's rights against the United States *under the Suits in Admiralty Act*. But seamen employed on vessels engaged solely as *public vessels*, and not within the Suits in Admiralty Act, would have their exclusive right to receive compensation payments.[14] It was to prevent any possibility of WSA merchant seamen being assimilated to public

[14] See S. Rep. 62, 78th Cong., 1st Sess., p. 5; H. Rep. 107, 78th Cong., 1st Sess., pp. 16, 34; S. Rep. 1813, 77th Cong., 2d Sess., p. 23; S. Rep. 1655, 77th Cong., 2d Sess., p. 19; H. Rep. 2572, 77th Cong., 2d Sess., p. 9.

vessel seamen like those of the armed services (whose compensation rights were recognized as exclusive), that the legislation was deemed necessary.

The general understanding in and out of Congress was plainly that the exclusive right of civil service crew-members of armed forces vessels was compensation, and that WSA merchant seamen were being fairly dealt with when they were given, in exchange for the public vessel seamen's right of compensation, the same right of recovery by suit, but without compensation, which had always been the exclusive right of private merchant seamen. This understanding was emphasized in the letter of the Chairman of the Compensation Commission commenting on the Clarification bill. It stated:[15]

> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of the War Shipping Administration, and that the rights heretofore long enjoyed by seamen in other Federal services, who have acquired status as civil employees of the United States, will not be disturbed or affected. In this connection it may be pointed out that in services such as the Army Transport Service, seamen have been employed directly as civil employees of the United States and for many years have received the protection of the Federal Employees' Compensation Act.

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[15] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (Sept. 2, 1942), p. 6; H. Rep. 107, 78th Cong., 1st Sess., p. 34.

As to seamen in the Army Transport Service, it should be noted that the protection afforded by the Federal Employees' Compensation Act is far greater than that contemplated for seamen by the bill, H. R. 7424. The bill apparently would merely provide a basis for recovery of damages for injury or death only in the very limited class of cases where the employer was negligent. Negligence of the employer or contributory negligence or fault of the employee is not a factor in determining the payment of workmen's compensation benefits, and employees and dependents receive the same protection in all injury or death cases, whether or not the employer was at fault.

2. This legislative history thus confirms, as the Second Circuit recognized in *Bradey* v. *United States*, 151 F. 2d 742, 743, certiorari denied, 326 U.S. 795, that Congress intended compensation to provide both the military and civil service crewmembers of armed forces vessels with their exclusive right, and such seamen were not to be given a right of action against the United States for the negligence of their military superiors and fellow crew-members. Had this not been so, the Clarification Act would have been unnecessary, for WSA seamen would have had a right of action against the United States even though they were considered public vessel crew-members (as it was feared they would be), and there would have been no need whatever to pass legislation granting or confirming a right to sue.

Indeed, when World War II began it was already the law of two circuits (and no conflict existed) that suits for death and injury could be brought under the Public Vessels Act in accordance with its literal language. *Dobson* v. *United States* 27 F. 2d 807, 808 (C.A. 2), certiorari denied, 278 U.S. 653; *New England Maritime Co.* v. *United States*, 55 F. 2d 674, 685 (D. Mass.), affirmed *per curiam, sub. nom. United States* v. *Gould*, 73 F. 2d 1016 (C.A. 1). Thus there was no question as to the existence of jurisdiction. It was only because of the belief, in Congress and elsewhere, that while jurisdiction might exist under the Public Vessels Act, the right to compensation benefits was exclusive of any right of action for damages, or for maintenance and cure, on the part of public vessel crew-members, that legislation was necessary at all.

Moreover, if injured civil service seamen of armed forces and other public vessels had both the right to compensation and the right of action for damages, and for maintenance and cure, as petitioners argue, it is difficult to believe that Congress in the Clarification Act would have discriminated against WSA crew-members by giving them only a right of recovery by means of suit and depriving them of the right to compensation. The purpose of the Clarification Act was certainly not to restrict the rights of the merchant seamen to whom it applied.

Conversely, for Congress to have given the WSA merchant seamen both the rights of armed forces seamen under the Compensation Act and the rights of private merchant seamen to recovery by suit would have been a capricious discrimination. It would have been unjust against the private merchant seaman, who had only the right to sue their employers but no right to compensation benefits, against the military service component of the crews of armed forces vessels, who had only the right to disability and death compensation benefits but no right of action for recovery by suit, as well as against the civil service component of public vessel crews, who were, as Congress believed, limited like the military component to compensation and related benefits. The 1943 Congress accordingly never for a moment considered that course.

The consequence of petitioners' contention that no distinction should be drawn between merchant seamen and public vessel crew-members thus involves the adoption of that same unjustifiable discrimination in the silence of Congress. It gives civil service crew-members of armed forces vessels all the rights of both the military service and the merchant service groups. We submit that the Congress which passed the Clarification Act could never have intended thus to place the civil service component of the crews of public vessels in a position so far superior to both merchant seamen and to the military service component of the crew of the same public vessel.

III

Construing the Public Vessels Act and the Federal Employees' Compensation Act Together So as to Make a Workable, Consistent, and Equitable Whole Shows That Compensation and Related Benefits Were Intended to Be Exclusive for Service-Incident Injury, Sickness, and Death of Public Vessels Crew Members

That the Congress which passed the Clarification Act in 1943 did not err in its appraisal of the rights of public vessel crew-members is shown by a detailed consideration of the statutory scheme applicable to such seamen.

The problem is to determine the intention of Congress in providing government employees with two different statutory remedies against their employer. In the present cases the two different remedies are the Public Vessels Act of 1925 (43 Stat. 1112; 46 U.S.C. 781 *et seq.*) and the Federal Employees, Compensation Act of 1916 (39 Stat. 742, 5 U.S.C. 751 *et seq.*[16] Once again, as this Court observed in *Feres v. United States,* 340 U.S. 135, 138, "There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."

[16] As we have seen, *supra*, pp. 23-24, in other contexts the statutes will vary; for example in the case of Park Police, substituting the Tort Claims Act and the Police and Firemen's Relief Act.

Where injury, sickness, or death is not incident to the employee's service, it is obvious that the exclusive remedy is under the Public Vessels Act, or under the Tort Claims Act or the Suits in Admiralty Act, if the other circumstances render one of the latter acts rather than the Public Vessels Act the appropriate remedy. This is so because the Federal Employees' Compensation Act, unlike the corresponding statutes relating to military service employees, is limited to cases of injury, sickness, and death in the performance of duty. Everything in the service of the ship is in the performance of duty where crew-members are involved. *Aguilar v. Standard Oil Co.*, 318 U.S. 724; *Warren v. United States*, 340 U.S. 523. Thus the coverage of the Federal Employees' Compensation Act, which extends to all injury, sickness or death "sustained in the performance of his duty" (5 U.S.C. 751), and is not limited to those "arising out of and in the course of employment" (cf. 33 U.S.C. 902), is extremely broad in the case of crew-members. But there are, none the less, rare occasions when public vessel seamen of the civil, no less than those of the military, service may still be injured while they are not in the performance of duty. In such cases the Compensation Act does not apply and their remedy under the Public Vessels, Tort Claims, and Suits in Admiralty Acts is of necessity exclusive. There remains, however, the mass of cases, like those now at bar, where the Compensation Act applies because the employee was in

the performance of duty and yet jurisdiction for suit exists under the language of the Public Vessels Act. It is the solution of such cases where two remedies are available which is the concern of this Point.

Of a similar situation involving the existence of two remedies, the *Feres* case stated (340 U.S., at 144): "We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other; or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions." But it was also said of such situations (at 139) that "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." In so doing, as was said in *Brooks* v. *United States,* 337 U.S. 49, 52, "Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose."

We turn therefore to the examination of petitioner's two statutory remedies, with a view to seeing how they may best be harmonized. We will look first at the Public Vessels Act of 1925, then at the Federal Employees' Compensation Act of

1916. We will examine the consequences of the construction for which petitioners are contending and finally take some note of the judicial decisions which have dealt with the problem.

A. *The Public Vessels Act, in granting general jurisdiction over suits against the Government for injury, sickness, and death, did not impliedly create a new cause of action for damages, maintenance and cure for service-incident injury, sickness, and death.*

The language of the Public Vessels Act of 1925 provides broadly for jurisdiction of all libels in admiralty "for damages caused by a public vessel of the United States" (46 U.S.C. 781). No exceptions of suits by government personnel are made. The pattern is the same as in the Tucker Act of 1887, which granted jurisdiction of all claims founded "upon any contract, express or implied * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (24 Stat. 505). Jurisdiction was granted by the 1925 Act for suits in tort against the Government by its civil and military personnel seeking damages for injury, sickness or death, where previously jurisdiction for suits had been restricted by the Tucker Act to claims for wages, maintenance and cure, and indemnity for breach of the implied

contract to furnish a seaworthy vessel—all of which sound essentially in contract as implied undertakings of the shipowner.[17]

The only difference in the statutes lies in the omission from the Public Vessels Act of the phrase in the Tucker Act restricting suit to claims "in respect of which claims the party would be entitled to redress * * * if the United States were suable." (This omission, as we shall point out, was clearly not intended by Congress to alter the effect of the jurisdictional grant or to create new rights of action.) There can thus be no question but that Congress in the Public Vessels Act, exactly as in the Tort Claims and Suits in Admiralty Acts, has given a judicial remedy to all government employees of the civil and military service as well as to all other persons. Indeed, were tort suits by civil service employees to be excluded from such jurisdictional acts, they would be remediless for any injury, sickness, or death which was not incident to their service and so would fall outside the Compensation Act. Moreover, the jurisdictional remedy of necessity extends equally to employees' cases arising in the performance of their duties. Were this not so, the courts could not validly

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[17] *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 730; *The Osceola*, 189 U.S. 158. Because the Public Vessels Act (like the Suits in Admiralty Act) is exclusive of the Tucker Act, Public Vessels Act jurisdiction, where available, has now replaced that of the Tucker Act where suits for wages, maintenance, cure and unseaworthiness are involved. *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9); *Thomason* v. *United States*, 184 F. 2d 105 (C.A. 9).

determine whether the case arose in the performance of the employee's duty, so as to decide the essential question of whether there is a cause of action for the injury, sickness or death involved.

But this Court has pointed out, "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury" (*Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 384). This essential distinction between the existence of a judicial remedy and the possession of a right of action on which recovery may be had was emphasized in *Feres*, where the Court said (340 U.S. at 140): "This [language] confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists * * * it remains for courts, in the exercise of their jurisdiction, to determine whether any claim is recognizable in law."

Indeed, it is familiar and long settled that Congress by providing a judicial remedy by suit against the United States does not thereby create, or impliedly recognize as already existing, a right of action which can be enforced under the new jurisdiction. It was well said in *Kuhnert* v. *United States*, 127 F. 2d 824, 826 (C.A. 8), "We think that no court would be justified in interpreting an act of Congress as creating a new cause of action

against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction." See also *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952, 954 (N.D. Ala.).

We turn therefore to the consideration of whether anything in the legislative history of the Public Vessels Act, including the omission from the 1925 Act of the Tucker Act's restriction to cases where "the party would be entitled to redress * * * if the United States were suable," shows that Congress gave government personnel a right of action for damages, maintenance and cure for injury, sickness, or death in the performance of duty when they already had a right to compensation, paid leave, and related benefits under the compensation statutes.

The legislative history of the Public Vessels Act is quickly summarized. The Suits in Admiralty Act applies only where the vessel involved is "employed as a merchant vessel" (46 U.S.C. 742). It did not apply to Army or Navy vessels nor to the various small craft operated by other government agencies. It was sought to bring damage by such public vessels within the jurisdiction of the courts. On May 29, 1924, Congressman Underhill introduced H. R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as concerns the provision pertinent here. At that time there were already pending two other

bills, H. R. 6989 and H. R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H. R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress after the enactment of the Suits in Admiralty Act in 1920. It provided for suit "for collisions caused by * * * public vessels," and had the approval of all interested Government departments. H. R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, to remove its existing limitation to those vessels operated by the Government as merchant vessels. H. R. 9075 had the powerful support of the Maritime Law Association of the United States, but it equally had the strenuous opposition of the interested departments. They were extremely apprehensive of danger if public vessels were placed on the same footing as merchant vessels. They were insisting on many and important changes.[18]

Protracted delays were apparent if an attempt were made to rewrite H. R. 9075 so as to meet these governmental objections. Instead of proceeding further with either H. R. 6989 or H. R. 9075, Mr. Underhill, for the Judiciary Committee, introduced a new bill, H. R. 9535, which was to become

[18] House Judiciary Committee, 68th Cong., 1st Sess., Hearing on H. R. 9075 (May 21, 1924). The Maritime Law Association and the interested departments had taken substantially similar positions on a previous bill of similar import. See Hearings on H. R. 13591, 66th Cong., 3d Sess. (February 2, 1921).

the Public Vessels Act as we know it. H. R. 9535, in place of limiting its grant of jurisdiction to suits "for collisions caused by * * * public vessels," extended it to all suits "for damage caused by * * * public vessels." The purpose of this change is nowhere discussed. Statements in the reports and in the course of the debates indicate that only relief from property damage may have been clearly in mind and may have been all that was specifically intended. See 66 Cong. Rec. 2087; S. Rep. 941, 68th Cong., 2d Sess., p. 1; cf. *American Stevedores* v. *Porello*, 330 U.S. 446.

At no time was any discussion had of the omission from the bills of language similar to that in the Tucker Act, restricting suit to cases where the claimant "would be entitled to redress * * * if the United States were suable." No discussion was had as to the bills' possible application to claims for injury, sickness or death, or what effect the new grant of jurisdiction would have on the rights of civil and military service crew-members of public vessels who had no rights under the Suits in Admiralty Act and who had previously sought no relief by suit under the Tucker Act for wages, maintenance, cure and unseaworthiness, but had been content with their compensation and related rights.

The chief emphasis in the debates was placed on the burden imposed on Congress and the delays to the litigants resulting from private relief bill

legislation. Thus Congressman Underhill, in charge of the bill, declared, "I think there is no justification for the method by which claims against the Government are settled today. There is no justice in it. There is no equity in it. It is one of the worst conditions that exist in the Government today"[19] (66 Cong. Rec. 2087). So Senator Bayard, in charge of the bill in the upper chamber, emphasized that at the preceding Congress nearly 200 private bills granting relief for damage by maritime accidents had been introduced. The bill, Senator Robinson pointed out, "would relieve Congress of the consideration of a great many measures in the nature of private claims" (66 Cong. Rec. 3560). This, too, was the emphasis of the committee reports which included lists of the recent private relief acts which had been passed and seem to argue that the bill was an act for the relief of Congress as much as of claimants.[19]

None of the lists of claims found in the reports and nothing in their texts referred to claims by members of either the civil or military service components of the crews of public vessels. Without exception, these lists were concerned with damages to ships, piers, drydocks and marine railways.[20] Never at any time in the course of the debates in the House or Senate was it suggested that the bill

[19] S. Rep. 941, 68th Cong., 2d Sess., pp. 4, 10, 17; cf. H. Rep. 1301, 66th Cong., 3d Sess., pp. 4, 5.

[20] See fn. 19, *supra*.

could also have the effect of giving a right of action against the United States for death or injury of public vessel crew-members in the performance of duty or would alter the law under which their compensation and pension rights had theretofore been regarded as exclusive. It seems obvious that Congress intended to make no change in respect of the rights of public vessel seamen and was wholly unaware that the problem could be involved. This was only natural, of course, because "Congress was suffering from no plague of private bills" on behalf of either the civil or the military components of the crew of public vessels "because a comprehensive system of relief had been authorized for them and their dependents by statute." See *Feres* v. *United States*, 340 U.S. 135, 140.

It seems fairly certain, moreover, that the defense departments would not have permitted the new bill to go unchallenged if it had been intended to give crew-members of armed services vessels—whether in civilian or military service—the right to bring suit for the negligence of their military superiors or fellow crew-members in the performance of duties which ordinarily are intimately connected with matters of a military character. Yet nothing was said by the representatives of the defense departments or the Department of Justice in their letters or statements at the hearings concerning any possibility that the bill would permit recovery for death or injury in the performance

of duty by either military or civil service crewmembers of armed forces vessels. Just as with the omission of Congress to discuss the point, this was equally natural because, although the Tucker Act had conferred jurisdiction in 1887 of suits for unseaworthiness, maintenance and cure, no such suits had ever been brought.

We conclude, therefore, that Congress did not intend by granting broad jurisdiction of claims "for damages caused by a public vessel" to create or recognize any new right of action for damages, unseaworthiness, maintenance and cure, resulting from service-incident death, illness, or injury of members of either the civil or military service components of public vessel crews. We think Congress was aware of the fundamental distinction between granting jurisdiction and creating a right of action. It discussed only the extent of the jurisdiction conferred by the bills that became the Public Vessels Act because it did not regard itself as legislating on the subject of substantive rights of action.[21]

B. *The Federal Employees' Compensation Act of 1916 created a compulsory and exclusive right to compensation in place of any other liability of the United States.*

1. When originally enacted in 1916, and so far as relevant when the cases now before this Court

[21] For the lower court cases brought under the Public Vessels Act by persons eligible for compensation, see *infra*, pp. 80 *et seq.*

arose, the full text of the pertinent sections of the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, provided:

> [Sec. 1] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *
>
> Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

The Act thus emphasized in Section 1 that the United States "*shall pay* compensation for disability and death." Compensation is made absolutely mandatory on both sides. No election is given the employee in accepting nor is there any choice by the Government about paying. The Act further emphasized in Section 7 that, except for earned wages and military pensions, the liability of the United States for compensation should be exclusive of "any other kind of remuneration whatsoever."

In respect of other rights of compensation or benefits payable by the United States, express pro-

vision for election was made. Section 8 of the Act (5 U.S.C. 758) required the employee to elect between his right of compensation and his right to paid sick or annual leave. The Civil Service Retirement Act of 1920 and its successive amendments have similarly provided for election between the benefits of the compensation and the retirement acts (5 U.S.C. 714). Similar provisions were made when persons in the reserve of the various military services and in the Public Health Service were permitted to elect the benefits of the Compensation Act in place of the various special disability retirement and pension legislation.[22] Finally, a generalized provision for these types of election was made by the Public Health Service Act of July 1, 1944, c. 373, 58 Stat. 712 (5 U.S.C. 757 (a), first proviso). At no time, however, either in the original or any subsequent act, was provision made for election between the Compensation Act (or any similar act) and any possible right of action against the United States for unseaworthiness, maintenance, cure and wages under the Tucker Act or for damages under any tort jurisdiction statute, including the Public Vessels Act.

On the other hand, express provision was made from the beginning in respect of tort claims against parties "other than the United States," including the Panama Railroad Co., a New York corpora-

[22] See e.g., 5 U.S.C. 797, 10 U.S.C. 1711; 14 U.S.C. 311-312, 386; 34 U.S.C. 855c, 857e; 50 U.S.C. 1552.

tion of which the United States was stockholder. Sections 26 and 27 (5 U.S.C. 776, 777) provided in lieu of subrogation that such claims should be assigned to the United States or should be prosecuted by the beneficiary under the direction and for the benefit of the Government. With respect to cases involving the Panama Railroad Co. it was provided that the claim should be either assigned to the United States or released to the Railroad (5 U.S.C. 791).[23]

Thus, while the original 1916 draftsmen and its later amenders may not have so written the Act as to anticipate every future contention that the grant of a jurisdictional remedy against the United States impliedly recognized or created new rights of action and imposed new liabilities (in favor of public vessel crew-members or others), we believe that the Act is plainly grounded on the assumption that compensation was to be exclusive of all other rights against the United States for injury or death in the performance of duty. This is confirmed by the circumstances prevailing at the time of its enactment and its subsequent history.

2. Before the Federal Employees' Compensation Act of 1916, no general compensation law

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[23] As was said in *Panama RR Co.* v. *Minnix*, 282 Fed. 47, 49 (C.A. 5): "While the United States is the sole stockholder of that corporation, the corporate entity of that company is maintained, and the railroad is operated by the corporation. The employees are recognized by the act itself as being those of that corporation. It took an express provision of the Compensation Act to extend its benefits to them."

existed for the civil (as contrasted with the military) service crew-members of public vessels nor for civil employees as a class. The prior Acts of May 30, 1908, c. 236, 35 Stat. 556, and March 11, 1912, c. 57, 37 Stat. 74, applied to only certain workers in navy yards, arsenals, construction projects, and a few other occupations deemed especially hazardous. The hearings and committee reports on the bill which became the 1916 Act constantly emphasize the absence of any right of recovery for other government workers against their employer except by means of the tremendous flood of private relief bills. As with the later Public Vessels and Tort Claims Acts, heavy emphasis was placed upon the importance of relieving Congress of this burden of private legislation.[24]

In 1916, there was neither jurisdiction nor a right of action in tort for public vessel crew-members or other government employees seeking to recover against the United States. Moreover, if there had been jurisdiction they would probably have been barred either by the fellow servant rule or the rule that the ship operator is not liable for the negligence of the master and crew. *Pacific SS Co.* v. *Peterson*, 278 U.S. 130, 134; *Carlisle Packing Co.* v.

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[24] 64th Cong., 1st Sess., House Judiciary Committee, Hearings on H. R. 15316 (esp. pp. 5, 11) and H. Rep. 678, esp. p. 8). Other reports and documents relating to the compensation bills are H. Doc. 1135, 63d Cong., 2d Sess.; H. Rep. 561, 63d Cong., 2d Sess.; S. Rep. 733, 64th Cong., 1st Sess.; H. Rep. 1195, 64th Cong., 1st Sess. The appendix of the Congressional Record is full of accounts of the delays of private bill relief.

Sandanger, 259 U.S. 255, 258; *Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 382; *The Osceola*, 189 U.S. 158, 175. But, on the other hand, there would seem to have been no lack of a jurisdictional remedy under the Tucker Act for suits by civil service crew-members for wages, maintenance, cure and unseaworthiness. After 1887, the Tucker Act, as we have already seen (*supra*, p. 45), granted jurisdiction of claims founded "upon any contract, express or implied * * * or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (24 Stat. 505). Nonetheless, although there would seem to be no doubt that claims for wages, maintenance, cure and unseaworthiness rest upon the implied contract of the ship-operator on which suit could be brought in admiralty,[25] no civil service crew-member appears to have attempted to bring such a suit against the United States. We can only infer that it was the general belief in 1916 that civil service crew-members of public vessels, unlike private seamen, were regarded as having no such right of action against their employer.

3. This Court early indicated the view that the Compensation Act was exclusive, by dicta in *Dahn* v. *Davis*, 258 U.S. 421, affirming *Hines* v. *Dahn*, 267

[25] See *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 730; *The Osceola*, 189 U.S. 158; *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9).

Fed. 105 (C.A. 8). There the Court quoted the provisions of the Compensation Act and stated that while there were two *remedies* between which the injured employee might elect and could pursue only one to satisfaction, the sole *right of recovery* was under the Compensation Act. Referring to section 7, the Court pointed out (p. 429) that, "It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided in the act." It construed the language of the whole act as evidencing (p. 430) "the disposition to treat the compensation provided for as adequate for the injuries received" and negativing the existence of any other rights against the United States.

Petitioners appear to contend that this reference by the Court to the indisputable fact that there were two *remedies* means that the Court intended to hold that there were also two *rights of recovery* for injury, sickness, or death of a government employee, between which two recoveries the claimant has an unrestricted choice. But such a reading of opinion conflicts with the Court's dicta to the effect that compensation benefits were to be the sole payments by the United States. Although the opinion is not explicit throughout, we believe that the Court did not employ the word "remedies" rather than "rights" by inadvertence and did not intend to ignore the distinction between rights and remedies or to hold without discussion that contrary to the

Court's statement regarding section 7, payments for injuries would be made otherwise than as provided in the Act. The case required the Court to go no further than to decide that, having pursued the compensation remedy to an adjudicated award, the claimant could not also pursue the other judicial remedy even to the extent of asking the courts to determine whether there was a right of action for the injury and death as well as a right to compensation. While the Court did not cite any case or refer to the fundamental distinction, we submit that in stating that claimants had an election of *remedies,* the Court nonetheless had clearly in mind the distinction that "A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis* v. *Luckenbach SS Co.*, 274 U.S. 372, 384. We believe that careful examination of the case bears this out.

In *Dahn's* case, as in the cases now at bar, compensation had first been collected. A railway mail clerk employed by the Post Office Department was injured in the performance of duty by the negligence of the Illinois Central Railroad Company (while under federal control in World War I). His widow obtained an award under the Federal Employees' Compensation Act. In accordance with Sections 26 and 27 of the Act (5 U.S.C. 776, 777), suit was then brought, pursuant to the directions of the Compensation Commission, against the railroad and the Director General of Railroads.

Although the Government was thus a party in interest with both the claimant and the defendant, the plaintiff contended that by virtue of Section 10 of the Federal (Railroad) Control Act of March 21, 1918, c. 25, 40 Stat. 451, no defense was to be made by the Director on the ground that the railroad was an agency of the Government. Plaintiff argued that the Control Act made the Director a third party tort-feasor, the same as a private carrier for purposes of Sections 26 and 27.

The Eighth Circuit rejected this contention. It held, however, that although she had two remedies —one judicial, the other administrative—plaintiff was precluded from recovery because (like petitioners in the cases now at bar) she had claimed compensation and the administrative claim was allowed.[26]

On certiorari, this Court agreed that while plaintiff had two *remedies,* one by suit and one by claim for compensation (258 U.S. at 428), she was precluded from the exercise of her judicial remedy as a result of her having claimed compensation. This Court's decision as to preclusion was rested upon the double ground (258 U.S. at 432) of, *first,* "the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final" and, *second,* "because the petitioner elected to pursue to payment the remedy given him there-

[26] Cf. *Payne* v. *Cohlmeyer,* 275 Fed. 803 (C.A. 7) (U.S. deputy marshal); *Midway Nat. Bank & Trust Co.* v. *Davis,* 288 Mo. 563 (employee of same railroad).

under." In commenting on Section 7, which provides that while in receipt of compensation a Federal employee shall not receive any other "remuneration from the United States," the Court quoted the language of Section 7 and concluded (p. 429):

> It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act.

And in commenting upon Sections 26 and 27, respecting election in suits against third party tort feasors, the Court further observed (p. 430):

> Plainly, by these two sections Congress deals with the liability of persons *"other than the United States"* to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. *The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.* [Last emphasis supplied.]

This Court thus recognized that, read as a whole, the fair meaning of the Act is that although claimants have two *remedies*, and may elect which one to exercise, the remedy by suit will produce no recov-

ery because the Compensation Act provides that no payment will be made by the Government for service-incident injury, sickness, and death, except as provided in the Act.

Brady v. *Roosevelt SS. Co.*, 317 U.S. 575, is to the same effect. There a customs inspector was injured in the performance of duty by the negligence of Roosevelt SS. Co., an agent operating a vessel for the Government under a demise operating agreement. His widow obtained an award under the Federal Employees Compensation Act and, as in *Dahn* v. *Davis, supra,* in accordance with Sections 26 and 27 of the Act, suit was brought under direction of the Compensation Commission against the Government's agent. The Court of Appeals for the Second Circuit (128 F. 2d 169) held that plaintiff's right to sue the United States under the Suits in Admiralty Act was exclusive of any right against the agent. On certiorari, the agent, and the Solicitor General appearing as *amicus,* contended that plaintiff's exclusive judicial remedy was under the Suits in Admiralty Act and, compensation having been collected, *Dahn* v. *Davis* precluded such a suit. This Court stated (*id.*, p. 577) "We agree with the court below that this was a maritime tort over which the admiralty court has jurisdiction * * *. And we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act. * * * The sole question here is whether the Suits in Admiralty Act

makes private operators such as respondent nonsuable for their torts." The Court held that eligibility for and receipt of compensation barred suit against the United States, citing *Dahn* v. *Davis* (p. 581); but declared "He may however sue 'some person other than the United States'; and in case of recovery the amount is credited on the amount of compensation payable to him," citing 5 U.S.C. 777. The Court held the operating agent was such a person.[27]

In only one other case has a court examined the actual text of the Compensation Act, instead of assuming that the omission of a separate clause respecting exclusiveness left the statute ambiguous on the point.[28] In *Feres* v. *United States,* 177 F. 2d 535, 537, affirmed, 340 U.S. 135, the Second Circuit, in explaining the final omission from the Tort Claims Act of any exception for claims covered by the Federal Employees' Compensation Act, after referring to Section 7 (5 U.S.C. 757) (discussed by this Court in the *Dahn* case (*supra,* pp. 59, 62)), stated "it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary."

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[27] In *Brooks* v. *United States,* 337 U.S. 49, 53, the Court, by way of dictum, stated that the Federal Employees Compensation Act provided for an election of remedies. Inasmuch as the only election provided by the Act in so far as the United States is concerned is between compensation and other statutory benefits, it would seem to have little significance where as here the sole question is the exclusiveness of the right of compensation. Cf. *Feres* v. *United States,* 340 U.S. 135, 144.

[28] For other lower court cases see *infra,* pp. 78 *et seq.*

The Compensation Act of itself was exclusive.[29]

In the light of the foregoing review of the language of the Compensation Act and related statutes, and the decisions in the *Dahn* and *Feres* cases, we submit that (a) the circumstances surrounding the enactment of the Public Vessels Act show no reason for Congress to anticipate that the grant of a judicial remedy by that Act "for damages caused by a public vessel" would imply the creation of a new right of action for damages, maintenance and cure in the civil service component of public vessel crews, and (b) the Compensation Act made its benefits exclusive for persons within its coverage. Having examined the language and history of the statutes creating the two remedies, we now pass to the consideration of the consequences of petitioners' contention that there are not only two remedies but also two rights of recovery for service-incident injury, sickness and death.

C. *Implying a right of action for damages, maintenance and cure would lead to consequences which in the silence of Congress should not be presumed to have been intended*

This Court in *Brooks* v. *United States*, 337 U.S. 49, 52, said that the construction of statutes giving

[29] Were this not the case, the insertion in the Tort Claims Act of a special exception would have served as a ground for the contention that its absence from the Public Vessels Act (and the Tucker Act) indicated that public vessel seamen of both the civil and military components had a right of action on which recovery could be had.

remedies against the Government should take account of the consequences of the various readings as an aid to the determination of the Congressional purpose. In *Feres* v. *United States*, 340 U.S. 135, 139, it was further stated that such statutes should be construed together so that the entire system of remedies against the United States would "make a workable, consistent and equitable whole." These tests cannot be met by petitioners' contention that crew-members of public vessels have been granted both the right to compensation, paid sick and annual leave, retirement and related benefits, which is exclusive for other civil and military employees, and also the right of action for damages, unseaworthiness, maintenance, cure and wages, which is exclusive for merchant seamen. The consequences of petitioners' reading of the statute would plainly be unworkable, inconsistent, and inequitable. Five such consequences appear to justify particular attention.

1. *Election in the absence of explicit statutory provision is unworkable.*—The insolvable confusion which would result in view of the failure of the draftsmen of the various statutes to provide how to deal with double recovery or election constitutes a most significant consequence of treating the Public Vessels Act as having created or recognized a right of action for damages, unseaworthiness, maintenance, cure and wages on the part of the civil service component of public

vessels of the Army and Navy. As this Court said of the same problem in the *Feres* v. *United States* (340 U.S. 135, 144): "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." We believe that the identity of the problem presented, whether the compensation benefits are under the civil or the military service statutes, indicates that an identical intention would have existed on the part of Congress in respect of civil and military service employees alike.

The necessity for reaching an identical conclusion, whether civil or military service personnel is involved, is reenforced by the right of military reservists on temporary active duty to elect between benefits under the military compensation statutes and the usually more favorable Federal Employees' Compensation Act benefits.[30] Under petitioners' view the rule of the *Feres* case might be entirely avoided in such circumstances. If the widow of a member of the military component of

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[30] See Sec. 7 (5 U.S.C. 757), proviso to para. (a), as added by Act of July 1, 1944, c. 373, 58 Stat. 712, and the various statutory provisions cited in footnote 22, *supra*, p. 55; cf. *O'Neal* v. *United States*, 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2).

the crew elects the smaller military benefits[31], she is confined to them by *Feres,* but if petitioner's view of the Federal Employees' Compensation Act prevails and she elects benefits under that Act, she may first obtain an award and then, having made her election not to take military benefits, can reject the F.E.C.A. payments and recover for wrongful death by suit under the Public Vessels Act.

The detailed provisions made by Congress in the original Compensation Act of 1916, coupled with its failure to make any corresponding provision in respect of a right of recovery under the Tucker Act or the Public Vessels Act, strongly suggests the Congressional understanding that the rights of compensation, paid leave, and retirement are exclusive, and there is no "election". The dispositive character of this absence of statutory direction for double recovery or "election" between the right to compensation and a right of action for damages, which the Court emphasized in *Feres* v. *United States* (340 U.S. at 144), is fully

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[31] A wife and one child is entitled to $78 in the event of the service-incident death of a soldier regardless of rank (38 C.F.R. 1946 Supp. § 35.06, p. 5913). In addition the widow receives the six months death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903). The widow of a reservist on active duty, however, may elect benefits under the Federal Employees' Compensation Act. Under the F.E.C.A. a wife and one child receive 55 percent of decedent's pay taken at not less than $150 per month. In the *Mandel* case, No. 414, the benefits for the widow and child would be $226.41 per month.

demonstrated when the cases trying to apply the "election" rule are examined.

Where crew-members are involved, the problem is complicated by their enjoyment of special seamen's privileges as wards of the admiralty judges. Thus, it has been held that even collection of cash compensation benefits by a seaman does not preclude him from recovery by suit. *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (C.A. 1); *Gahagan Construction Corp.* v. *Armaco*, 165 F. 2d 301 (C.A. 1); cf. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239; *Muruaga* v. *United States*, 172 F. 2d 318 (C.A. 2); *Dice* v. *Akron, C. & Y. R. R. Co.*, No. 374, decided February 4, 1952. Relying on the rule of the *Dahn* case, 258 U.S. 421 (*supra*, pp. 58-63), however, the district court in the *Johansen* case (JR. 11-12) and some other district courts have held the contrary: *Wright* v. *United States*, 95 F. Supp. 77 (N.D. Calif.); *Frader* v. *United States*, 91 F. Supp. 657 (S.D. N.Y.).[32]

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[32] Where shoreside employees are involved, the general rule is as stated in 71 Corpus Juris, p. 1488: "An election to take compensation under the statute, as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto is disputed, or by accepting compensation or medical services * * * bars an action to recover damages." Thus in *Hines* v. *Dahn*, 267 Fed. 105, 114 (C.A. 8), affirmed, *sub nom. Dahn* v. *Davis*, 258 U.S. 421, it was stated that the making of the award even without its collection precluded suit. This appears to stem from the fact that where the United States is concerned, mere delivery of a check is a binding payment without cashing it. See *Beers* v. *Federal Security Administrator*, 80 F. Supp. 183 (D. Conn.), affirmed, 172 F. 2d 34 (C.A. 2); *Anthony P. Miller, Inc.* v. *Commissioner*, 164 F. 2d 268, 269 (C.A. 3): "it is most common to speak of

State courts similarly hold that when a claim for compensation is adjudicated under state compensation acts, the award acts as *res judicata* and estops the claimant from refusing the payment and bringing suit. *Nyland* v. *Northern Packing Co.*, 56 N.D. 624; *Sotonyi* v. *Detroit City Gas Co.*, 251 Mich. 393.[33] Even acceptance of medical and burial benefits is held to constitute an election. *Gibbs* v. *United States*, 94 F. Supp. 586 (N.D. Calif.); *Ocasio* v. *United States*, 99 F. Supp. 601 (D. Puerto Rico); *Mains* v. *J. E. Harris Co.*, 119 W. Va. 730; *Hlas* v. *Quaker Oats Co.*, 211 Iowa 348; *Talge Mahogany Co.* v. *Burrows*, 191 Ind. 167.[34]

We submit that this divergence of views in the lower courts shows the difficulties which would be the consequence of treating the matter as one of "election." It shows the unlikelihood of Congress, having had any intention of creating a cause of action. It confirms that the only workable solution

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'paying' an obligation by giving one's check for it." Delivery fully perfected the election made in filing claim. Where the Government is concerned no question of collectibility can be involved and the Government's promise in the check differs in no respect from its promise in its regular paper currency.

[33] The filing of claim for compensation is an election and under the rule of exhaustion of administrative remedies requires that any pending suit be stayed or dismissed. *Simas* v. *Dugan*, 116 Atl. 755 (R.I.).

[34] In the latter case the court said (191 Ind. at 188): "It is not the law that a person who has done an act with full knowledge of all material facts can avoid the consequences annexed by law to such act by alleging and testifying that when he did it he was not advised that the law gave him a choice between that course and a different one, and that he afterward learned what the law was and chose the different course."

of the problem here, as in the *Feres* case, is to hold that compensation is exclusive. As the Court said in *Dahn* v. *Davis, supra*, the statutes evidence a Congressional disposition "to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U.S. at 430).

2. *Election in the absence of explicit statutory provision is inconsistent with other compensation acts.*—It is inconsistent with all other compensation acts to imply a right of election in the silence of Congress. Only the compensation statutes of Great Britain and New Hampshire allow a general right of election and both make explicit, detailed provisions concerning it.[35] Both this Court in the *Feres* case (340 U.S. at 143) and the court below in the *Mandel* case (MR. 104), gave controlling weight to the familiar rule that, unless the statute is by its terms elective, the rights provided are exclusive, so far as the employer is concerned, whenever the statute is applicable. See Schneider, *Workmen's Compensation Law*, (1941) §§ 89-154, esp. § 147, p. 421; Prosser, *Torts*, (1941) p. 543; 71 Corp. Jur. p. 1480.

The absence of any express legislative direction for double recovery or election thus seems compelling that the rights provided by the Act were expected to be exclusive for service-incident injury,

[35] 15 and 16 Geo. V, c. 84, § 29(1); N.H. Pub. Laws c. 178, § 11.

sickness, and death. Where not incident to service the opposite rule, of course, prevails and a right of action exists. Cf. *Brooks* v. *United States,* 337 U.S. 49. In the latter situations, there is not only jurisdiction for suit under the Tort Claims, Public Vessels, or Suits in Admiralty Acts, as may be appropriate, but recovery in such suits is plaintiff's exclusive right if he is a civil service employee (see, *supra,* p. 43). Such a construction is particularly necessary to produce a consistent and equitable whole of the congressional enactments, in view of the much more favorable benefits enjoyed by civil service crew-members on public vessels.

3. *Election by public vessel crew-members would discriminate inequitably against merchant seamen.* —The unjust and inequitable discrimination against merchant seamen, both private and those of the WSA/NSA, resulting from implying a right of election where public vessel seamen are involved, was relied upon by both courts below (JR. 16-17; MR. 105, fn. 13).

The careful consideration by Congress of the vastly different rights of merchant seamen and public vessel seamen, at the time of the adoption of the Clarification Act (see *supra,* pp. 32-41), weighs heavily against the implication that in making recovery by suit against their employer (the United States the exclusive rights of WSA seamen, Congress meant without any reason to discriminate,

against them. On the contrary, the careful consideration of Congress, followed by its decision not to change the rights of regular public vessel seamen, but to give WSA seamen the same exclusive right of recovery by unit as merchant seamen, was to confirm each class in its preexisting rights. Cf. *Bradey* v. *United States*, 151 F. 2d 742, 743 (C.A. 2), certiorari denied, 326 U.S. 795.[36]

Congress could not have contemplated that the civil service component of the crews of public vessels should enjoy at once both the right to disability and death benefits, exclusive in the case of their fellow crew-members of the military component, and the right of recovery by suit, exclusive in the case of merchant seamen. The discrimination against the other groups is too glaring.

4. *Election by the civil service component of Army and Navy vessels would discriminate inequitably against their fellow crew-members.*—The doctrine adopted by this Court in *Feres* (340 U.S. 135) that the disability compensation and pension laws applicable to military personnel were the equiva-

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[36] There the court said: "Congress did not expect those in its service upon public vessels to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries. The compensation provided for the Navy is indeed not the same as that provided under the United States Employees Compensation Act, 5 U.S.C.A. 751 *et seq.*; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive. * * *"

lent of benefits under the Federal Employees' Compensation originated from the refusal to discriminate against beneficiaries of that Act and in favor of military personnel. The first case was *Haselden* v. *United States*, 24 F. 2d 529 (E.D. N.Y.), affirmed *sub nom. Dobson* v. *United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, involving the claim of a Navy rating on a public vessel. There the district court expressly relied on the fact that, while the Federal Employees' Compensation Act did not apply, the same "well-established policy of the government is shown in the pension laws" (at p. 530). The converse of the rule appears equally applicable.

Members of the civil and military components of military transport crews are exposed to essentially similar risks. *Supra*, pp. 27-30. It is now established that when military personnel suffer injury, illness, or death in the performance of routine peacetime duty—such as living in barracks which are negligently maintained or being subject to negligent operations and treatment by military doctors and hospitals or being negligently injured in a collision with another vessel while on training—they have no right of action on which suit can be maintained under the appropriate jurisdictional act. By reason of the decisions in *Feres* v. *United States*, 340 U.S. 135; *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U.S. 795, and *Dobson* v. *United States*,

27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, crew members of the military component have compensation and related benefits as their exclusive right.

The unlikelihood that Congress intended a different rule for their fellow crew-members of the civil service component, injured while engaged in equally routine peacetime military operations, is especially marked when it is remembered that the benefits under the Federal Employees' Compensation Act are many times more liberal than those paid under either the harbor-workers are the military compensation statutes.[37]

5. *Election to recover by suit might sometimes lead to judicial intrusion into military operations.* —The possibility of judicial intrusion in certain cases into the realm of responsibility in military affairs may also afford a reason for believing that Congress would not have created a cause of action

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[37] See fn. 9, *supra*, p. 32. A wife and one child is entitled to $78 per month in the event of the death of a soldier in service. For each additional child the widow is entitled to $15 per month (38 C.F.R. 1946 Supp. 35.06, p. 5913). In addition she receives the six months' death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903). Under the Federal Employees' Compensation Act a wife with one child receives 55 percent of the decedent's pay, taken at not less than $150 per month. For each additional child 15 percent of the decedent's pay is added, but total compensation may not exceed $525 per month. In the *Mandel* case, No. 414, the decedent's pay and allowances for compensation purposes was $411.66 per month and the benefits for his wife and child would amount to $226.41 per month. The widows of his shipmates in the military service receive only about one third as much.

for service-incident injury, sickness, and death without first hearing the representatives of the defense departments and then dealing with the matter in express terms.

The matter is of some particular importance in No. 414, the *Mandel* case. It has, however, already been sufficiently adverted to above (pp. 29-30), is discussed in some detail by the Third Circuit (MR. 105-106), and is referred to by the Second Circuit in No. 401, the *Johansen* case (JR. 16, 17). Petitioners insist on the undoubted fact that such cases will probably be few in number compared to the total of service-incident injuries, sickness, and deaths (esp. Mandel Br. 11, 32-34).

It would seem a sufficient answer to petitioners that the same contention was made in *Feres* v. *United States,* 340 U.S. 135, where the Tort Claims Act, unlike the Public Vessels Act, contains an express exception for "combatant activities" and occurrences in "a foreign country" (28 U.S.C. 2680), so that the number of instances should be even smaller. This Court, however, found the line to be drawn and the bases of distinction to rest upon whether the injury, illness, or death was incident to service and not on whether it occurred during a "warlike operation" rather than in routine peacetime duty in barracks or hospital or training manoeuvers. We believe this consequence has at least the same validity here as in cases involving suits by military employees under the Tort Claims Act.

This view of the language and history of the Public Vessels Act and the Federal Employees' Compensation Act and of the consequences of treating the Acts as having given petitioners a right of action, as well as a right to compensation, shows that in the absence of express statutory direction by Congress petitioners' compensation rights were exclusive. We will examine next the history of the 1949 amendments to the Compensation Act to ascertain if they were intended to work any change.

IV

By the Compensation Act Amendments of 1949 Congress Left for Final Resolution by the Courts the Pre-Existing Conflict of Decision as to Whether Public Vessel Crew Members and Other Regular Civil Service Employees Who Enjoy Compensation and Related Benefits Also Have a Right of Action for Service-Incident Injury, Sickness, or Death

Petitioners apparently do not deny that the 1949 compensation amendments did not change the law relating to the civil service component of public vessel crews or grant them an express right of election.[38] But petitioners argue that the amendments show a Congressional recognition that the courts had previously established that public vessel crew members have such an election (*Johansen* Br. 12; *Mandel* Br. 15, 19). Since the impetus for the

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[38] The 1949 amendments expressly provided for the exclusiveness of compensation but declared that this new subsection (as distinct from the rest of the Act) "shall not apply to the master or a member of the crew of any vessel." *Infra*, p. 100. The lower courts have expressly declared that these amendments did not change the law in respect of exclusiveness (JR. 11; MR. 103, fn. 8).

provision in the original 1949 bill expressly making compensation exclusive was a desire to resolve the conflict of the lower courts without the necessity of resorting to this Court, petitioners would appear to be in error. Indeed, the contrary appears to be established by the absence of any representation by the defense departments at the hearings on the original bill or in connection with the last minute addition, by floor amendment, of the proviso excepting crew members of armed forces vessels from the new "exclusiveness" provision. As congressional recognition of a right of election would have the serious consequences for the Army and Navy Departments which we have discussed above (*supra*, pp. 27-30, 75-76), it is certain that the defense departments would not have allowed the matter of granting to military transport crew members an election of recovery by suit to have proceeded without their active participation and resistance.

In order that the actual purpose and effect of the 1949 amendments may be fully understood, we believe that the prior state of judicial consideration of the question and the legislative history of the Senate floor amendment, excepting crew members from the new explicit exclusiveness provisions, should be examined in detail.

A. *The Conflicting Cases Prior to the 1949 Amendments*

In addition to the two Courts of Appeals below,

two other Courts of Appeals have squarely held that, in the absence of any express Congressional direction for double recovery or election, compensation, paid leave and retirement benefits under the appropriate statutes are exclusive. *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726 (C.A. 5); *Lewis* v. *United States*, 190 F. 2d (C.A. D.C.), certiorari denied, 342 U.S. 869. One Court of Appeals has expressly held the contrary. *United States* v. *Marine*, 155 F. 2d 456 (C.A. 4); *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4). Two other Courts of Appeals, while holding, correctly in our view, that the courts have jurisdiction of suits by such compensation beneficiaries,[39] did not reach the question of exclusiveness because they found the plaintiffs had no right of action in any event. *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9); *Parr* v. *United States*, 172 F. 2d 462 (C.A. 10).[40]

The decisions relating to exclusiveness which existed at the time of the 1949 amendments may be divided into three periods. (1) Prior to the enactment of the Public Vessels Act of 1925 no suits were brought by public vessel seamen, although, as we have already noted (*supra*, pp. 45, 53), jurisdiction of suits for unseaworthiness, maintenance,

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[39] Cf. *Brady* v. *Roosevelt SS Co.*, 317 U.S. 575, 577: "we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act."

[40] The opinion in the *Parr* case (at p. 464) indicates the court thought the Fourth Circuit view to be correct. The Tenth Circuit took the same view of service-incident injuries of military personnel. *Griggs* v. *United States*, 178 F. 2d 1, reversed *sub nom. Feres* v. *United States*, 340 U.S. 135.

cure and wages undoubtedly existed under the Tucker Act of 1887 (24 Stat. 505). (2) After this Court's statement about Section 7 of the Federal Employees' Compensation Act in *Dahn* v. *Davis*, 258 U.S. 421, 429 (1922), that "It would be difficult to ~~furnish~~ a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the Act" until the *Marine* case (1946) and the district court decision in the *Mandel* case (1947), compensation was uniformly held to be exclusive. (3) From the *Marine* case until the enactment of the 1949 amendments, the tendency was reversed and a right of action in addition to a right to compensation, paid leave and retirement benefits was recognized. The course of decision had thus been anything but consistent throughout the three periods, and the question was thus the very opposite of having been settled by 1941 (cf. Johanson Br. 6; Mandel Br. 15).

The earliest case to deal with the question under the Federal Employees' Compensation Act was decided in 1925, *O'Neal* v. *United States*, 11 F. 2d 869 (E.D. N.Y.), affirmed, 11 F. 2d 871 (C.A. 2). A crew member of a Coast Guard vessel covered by the Federal Employees' Compensation Act was injured in the performance of duty. Almost as soon as the Public Vessels Act was enacted he brought suit thereunder. The district court dismissed. Without sharply distinguishing between the

court's jurisdiction over a suit "for damages caused by a public vessel" and the libelant's right of action, the opinion applied the rule, later announced by this Court, of construing the different remedies together "to make a workable, consistent and equitable whole". (*Feres* v. *United States,* 340 U.S. 135, 139). To allow recovery the court said "would be contrary to the well-established policy of the government, which has created the United States Employees' Compensation Commission to meet such conditions, and provided for the payment of compensation to its injured employees." Congress by providing jurisdiction "did not intend to overturn the government's established policy and permit its employees to bring actions for damages received on government ships in the course of their employment." The Second Circuit affirmed without opinion (11 F. 2d 871).

The next case involving a civil service crew member of a military vessel was *Lopez* v. *United States,* 59 F. Supp. 831 (S.D. N.Y.), decided in 1944. There, as in the cases now before this Court, suit was filed by a member of the civil service component of a military transport—the Army Hospital Ship *Seminole.* The United States answered denying that libelant had a right of action on the ground that libelant's right to compensation was exclusive. On exceptions, the answer was held good, Judge Coxe declaring that if the Government proved libelant was an employee of the Army Transporta-

tion Corps and not a ~~United States Army~~ merchant seaman, libelant's compensation right was exclusive. No appeal was taken, but, meanwhile, the Second Circuit announced, by considered dicta in cases involving public vessel crew members in military service (*Dobson* and *Bradey, infra*), its entire approval of the view that the Federal Employees' Compensation Act was exclusive—a view which it later applied to the present *Johansen* case.

In *Haselden* v. *United States,* 24 F. 2d 529 (E.D. N.Y.), suit was brought by crew members in the regular navy. The district court was asked to distinguish the *O'Neal* case on the ground that there the Federal Employees' Compensation Act was involved. It refused, declaring (at p. 530) that the same "well-established policy of the government is shown in the pension laws" applicable to military crew members. The Second Circuit affirmed *sub nom. Dobson* v. *United States,* 27 F. 2d, certiorari denied, 278 U.S. 653. The court conceded that jurisdiction appeared to have been granted: "Verbally, there is nothing which excludes liability for damage to property or person of officers or crew." Recovery by suit "would be too great a reversal of policy to be enacted by such general terms." If crew members are to have a right to recover for injury "by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found

in the above—quoted section 1" (46 U.S.C. 781) of the Public Vessels Act (27 F. 2d at 808). In *Bradey* v. *United States,* 151 F. 2d 742, certiorari denied, 326 U.S. 795, the Second Circuit once more conceded that nothing prevented jurisdiction of suits under the Public Vessels Act by crew members, but explained "because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection." The court again refused to distinguish military from civil service crew members, observing: "The compensation provided for the Navy is indeed not the same as that provided under the United States Employees Compensation Act, 5 U.S.C.A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive * * *" (151 F. 2d at 743).

Some language in these cases seems to conclude not merely that the libel is dismissed for lack of a cause of action, but also for want of jurisdiction. And they have been attacked on that ground as overruled. But the language used is no more than a form of words. As Justice Holmes said of a similar situation, where courts have only a limited jurisdiction, if there is no right of action the claim is of a kind that the court not only ought not to enforce but obviously has been granted no power to

enforce. *The Ira M. Hedges*, 218 U.S. 264, 270. Since the courts have only a limited jurisdiction of suits against the Government it is easily said that there is no *jurisdiction* when what is meant is that the claim does not constitute a right of action which could lead to liability.

While the rule of exclusiveness was thus being established by the Second Circuit with respect to public vessel crew members of both the civil and military service, the same rule was being elsewhere applied to shoreside civil service employees. *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726 (C.A. 5); *Thomason* v. *W.P.A.*, 47 F. Supp. 51 (D. Idaho), affirmed, 138 F. 2d 342 (C.A. 9); *White* v. *T.V.A.*, 58 F. Supp. 776 (E. D. Tenn.).[41] But a contrary result was reached by the Fourth Circuit in 1946 with respect to a regular shoreside civil service employee suing under the Suits in Admiralty Act in *United States* v. *Marine*, 155 F. 2d 456. The court ignored the *O'Neal, Lopez, Posey* and other previous contrary decisions, declared the Second Circuit's dicta in *Dobson* and *Bradey* inapplicable, and refused to consider that the admitted existence of jurisdiction was not conclusive of the existence of a right of action in libelant. The court declared that this Court's dictum in *Brady* v. *Roosevelt SS Co.*, 317 U.S. 575, 577, that "we may assume that

[41] The T.V.A. cases appear especially strong. It was contended that T.V.A., like the Panama R. R. Co., was a corporation distinct from the United States, and recovery by suit should be granted by analogy. The Fifth Circuit held otherwise (93 F. 2d at 728).

petitioner could have sued either the United States or the [Maritime] Commission under the Suits in Admiralty Act" was dispositive of the entire matter and that in the light of its context "the whole opinion in the Brady case was intended as a complete coverage of the subject" (155 F. 2d at 458).

The third case involving a civil service crew member of a public vessel was *United States* v. *Loyola*, 161 F. 2d 125 (C.A. 9). A member of the civil service component of the crew of the Army Transport *Etolin* recovered a district court judgment for maintenance and cure under the Tucker Act. The United States appealed on both the ground that libelant, having refused the medical treatment tendered by the Government, lost his right to claim maintenance money under the general maritime law as well as his right to claim compensation payments under the Compensation Act, and the further ground that nevertheless libelant's right to compensation was exclusive. The court never reached the problem of whether libelant's compensation rights remained exclusive although in the special circumstances he had forfeited them.[42]

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[42] The opinion (at p. 126) indicates that the jurisdiction of the court was questioned. However, the Government's brief (p. 17) expressly conceded that "despite compensation and pension acts, jurisdiction continues unabated under any applicable jurisdictional acts" but argued that compensation is exclusive and therefore bars "recovery in a suit under the jurisdictional act." The situation was repeated in *Johnson* v. *United States*, 186 F. 2d 120 (C.A. 4), where the court treats the Government as having challenged the jurisdiction although the Government's brief expressly stated, "although

The fourth and last decision, before the 1949 amendments, to involve the rights of civil service crew members of public vessels was that of the district court in the *Mandel* case (MR. 23; 74 F. Supp. 754). Just as in the *Marine* case, on which the opinion principally relied,[43] the district court failed to consider the *O'Neal* and *Lopez* cases and ignored the difference in rights between merchant seamen, on the one hand, who are denied compensation and related benefits and whose right of action is exclusive, and public vessel seamen, on the other hand, who enjoy such rights whether they belong to the civil or military service component of the crew. Despite the contrary command of Con-

jurisdiction to bring the suit exists, recovery against the United States cannot be had where the public vessel crew members are entitled to receive payments of compensation or pension benefits." State compensation decisions conform to this view. The defense that compensation is applicable and exclusive is not absence of jurisdiction in the court, for the court has jurisdiction of all torts, but lack of any right of action in the plaintiff. Accordingly, unless the right to compensation appears on the face of plaintiff's pleading, the matter must be presented by plea or answer, not by demurrer, exceptions, or motion to dismiss, and the burden is on the employer to establish the applicability of the compensation statute to the death or injury in suit. 58 Am. Jur. p. 615; 71 Corp. Jur. pp. 1500, 1502. *Hogan* v. *Buja*, 262 Fed. 224 (E.D. La.); *Kemper* v. *Gluck*, 327 Mo. 733, certiorari denied, 284 U.S. 649; *Beveridge* v. *Illinois Fuel Co.*, 283 Ill. 31; *Noble* v. *Detroit Taxicab & Trf. Co.*, 222 Mich. 414; *Jirout* v. *Gebelein*, 142 Md. 692.

[43] *Krey* v. *United States*, 123 F. 2d 1008 (C.A. 2), is also cited, apparently, as involving recovery by a public vessel crew member (MR. 26). See also the Third Circuit's opinion (MR. 108, fn. 15). While the *Krey* opinion states that jurisdiction was under the Public Vessels Act, the record and file papers show the libel (Art. 10) invoked jurisdiction under the Suits in Admiralty Act, the answer admitted it, and the vessel was in fact operated for the Maritime Commission as a merchant vessel.

gress in the Clarification Act, the opinion states "a seaman's remedies should not vary with the nature of the vessel upon which he is employed" (MR. 26; 74 F. Supp. at 755).

Thus it appears that at the time the 1949 Compensation Act amendments were under consideration the cases respecting public vessel crew members were in conflict, just as were those involving shoreside employees. In the cases of *O'Neal* and *Lopez*, the District Courts for the Eastern and Southern Districts of New York had held, with the apparent approval of Second Circuit; that the benefits of the Federal Employees' Compensation Act are exclusive in the case of beneficiaries who are crew members of public vessels. On the other hand, the district court below in the *Mandel* case had held such benefits not to be exclusive. Finally, the Ninth Circuit in the *Loyola* case had agreed with the Government that there was jurisdiction but did not reach or decide the question of exclusiveness.

B. *The Legislative History of the Proviso excepting Crew-Members from the Exclusiveness Provision of the Bill Which Became the Federal Employees' Compensation Amendment Act of 1949, Establish That Congress Did Not Intend to Alter the Pre-existing Law Relating to Exclusiveness.*

The inception of the amendment to Section 7

of the Federal Employees' Compensation Act of 1916 (5 U.S.C. 757), which added a new paragraph (b) declaring in express terms the exclusiveness of compensation when available (*infra*, p. 100), was the desire to resolve the conflict between the various decisions discussed above (*supra*, p. 78 *et seq.*), without requiring extended litigation of cases and eventual resolution by this Court. Since the rights of private and WSA/NSA merchant seamen had previously been settled by excluding both groups from compensation and making exclusive their right of action for damages, unseaworthiness, maintenance, cure and wages, it appears not to have been thought that any question of the rights of crew members was involved. The hearings were not participated in by either the Army and Navy or by any seamen's groups. The amending bill, H.R. 3191, 81st Cong., 1st Sess., including the declaratory provision as to exclusiveness, passed the House (95 Cong. Rec. 8764) and was favorably reported in the Senate by the Committee on Labor and Public Welfare (S. Rep. 836).[44] The seamen's unions, however, became apprehensive lest it might change the existing law, repeal the Clarification

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[44] Commenting on this provision of the bill, the Senate Report stated: "SEC. 201. Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *" (S. Rep. 836, p. 23).

Act's exclusion, and bring merchant seamen back under the Compensation Act.[45] The union representatives requested Senator Morse of Oregon to offer, on their behalf, certain floor amendments at the last moment of consideration of the bill.

Contrary to the implication of petitioner Mandel (Br. 16), the floor amendments offered by Senator Morse did not represent committee action. Throughout, Senator Morse accurately referred to the amendment as "my amendment" and Senator Douglas of Illinois, in charge of the bill, insisted upon the insertion in the Congressional Record of his statement giving his interpretation of the Morse floor amendments and his reason for accepting them (95 Cong. Rec. 13607).

Senator Morse repeatedly emphasized that the amendments were intended to preserve the pre-existing law for resolution by the courts. Thus he declared:

> In effect it continues the seamen in exactly the same legal position which they presently enjoy [95 Cong. Rec. 13607].
>
> * * * * *
>
> The representatives of maritime unions are now strongly urging, since the bill was placed

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[45] "While the House report on the bill (House Rept. No. 729, p. 13) states that it is not intended to repeal this specific statutory exclusion, doubts have been expressed as to whether the bill and the explanation in the House report would have the intended effect" (95 Cong. Rec. 13608).

on the Senate Calendar, that their right to sue the United States under maritime law be preserved and that they be kept in status quo. * * *

* * * * * *

* * * In short, the amendment is intended merely to preserve the status quo as to seamen. If the Congress should decide to go into this matter further at some future session, it could then do so without delaying the enactment of this urgently needed bill. [95 Cong. Rec. 13608.]

Senator Morse also intimated that the judicial interpretations of the existing law were in conflict and the amendments were only to preserve any rights the seamen might eventually be held to have. His prepared statement read (95 Cong. Rec. 13608):

* * * The new subsection [(b) of Section 305] would make clear that no provision of this amending act, *as distinguished from the existing Compensation Act itself*, shall be construed to affect any maritime rights or remedies of seamen. *The purpose is to reserve to seamen whatever rights they now have, or may be held to have,* under maritime law * * * [emphasis supplied].

His statement further pointed out in the same connection that one of his amendments would save the compensation rights of litigants in case the Government's position was upheld. It said (95 Cong. Rec. 13609):

> * * * it is provided that persons whose pending claims are dismissed on jurisdictional grounds, insufficiency of the pleadings, or *because the remedy under the Compensation Act is exclusive*, may file claim under the Compensation Act within similar time limitations" [emphasis supplied].

Senator Douglas, who was in charge of the bill, stated that the controlling reason for accepting the Morse amendments was the absence of hearings. This circumstance we have already adverted to; neither the defense departments nor the seamen had been heard with respect to either the original declaratory amendment to Section 7 of the Compensation Act or the Morse floor amendments. The statement of Senator Douglas said in pertinent part (95 Cong. Rec. 13609):

> Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.
>
> * * * * *
>
> It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act. For the same rea-

> son, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.
>
> In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights.

As thus amended, the bill passed the Senate (95 Cong. Rec. 13609). A week later the House accepted the Senate amendments without debate (95 Cong. Rec. 14060).

It is thus abundantly plain that both Senator Morse, acting at the request of the unions, and Senator Douglas, in charge of the bill, meant to preserve the preexisting law, including the distinction between the rights of crew members of Army and Navy vessels enjoying the right to Federal Employees' Compensation and WSA/NSA merchant seamen whose exclusive right is by suit under the Suits in Admiralty Act.

In the light of the circumstances related above, we believe that petitioners err in asserting that the acceptance of the Morse floor amendments constituted Congressional adoption of the view of the district court in the *Mandel* case (MR. 26) that

public vessel crew members have both a right to compensation and a right of action. We submit that it plainly appears that Congress has left the entire matter for final resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the exclusive right of public vessel crew members, such as petitioner Johansen and the decedent of petitioner Mandel, for service-incident injury, sickness, or death is the benefit of the applicable federal compensation, paid leave, and retirement statutes, and accordingly that the judgments of the courts below should be affirmed.

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FEBRUARY 1952.

APPENDIX

1. The pertinent provisions of the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112, are as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

* * * * *

> SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

* * * * *

> SEC. 9. The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the

owners, charterers, operators or agents of vessels.

* * * * *

2. The pertinent provisions of the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay compensation as hereinaffer specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

* * * * *

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

SEC. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

* * * * *

SEC. 26. If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After de-

ducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

SEC. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the

money or other property so received upon any compensation payable to him by the United States on account of the same injury.

* * * * *

SEC. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund.

* * * * *

SEC. 41. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided, however,* That for injuries occurring prior to the passage of this Act compensation shall be paid under the law in force at the time of the passage of this Act: *And provided further,* That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the

United States any right which he may have to share in any money or other property received in satisfaction of such liability of the Panama Railroad Company.

* * * * *

3. The pertinent provision of Title VI of the Public Health Service Act of July 1, 1944, c. 373, 58 Stat. 712, is as follows:

SEC. 605. (a) Section 7 of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", as amended (U. S. C., 1940 edition, title 5, sec. 757), is amended by changing the period at the end thereof to a colon and adding the following: "*Provided*, That whenever any person is entitled to receive any benefits under this Act by reason of his injury, or by reason of the death of an employee, as defined in section 40, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Commission may for good cause allow, and when made shall be irrevocable unless otherwise provided by law."

* * * * *

4. The pertinent provisions of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are as follows:

SEC. 201. Section 7 of the Federal Employees' Compensation Act, as amended (5 U. S. C., 1946 edition, sec. 757), is further amended by inserting the designation "(a)" immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

"(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel."

* * * * *

SEC. 302. The provisions of this Act shall not be construed to authorize the payment of

any compensation under the Federal Employees' Compensation Act in any case where, pursuant to private relief legislation, a beneficiary of such legislation has accepted payment of a grant in satisfaction of the liability of the United States (or its corporation, agency, or other instrumentality) in such case, or where such liability has been compromised and settled, or other satisfaction received, as the result of any action sounding in tort or under maritime law, or where a lump sum has been received under section 14 of the Federal Employees' Compensation Act and the lump-sum award is not modified or set aside for other reasons.

SEC. 303 * * *

(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a ~~civil~~ action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension

of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

* * * * *

SEC. 305. (a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in the Act of March 24, 1943, ch. 26, 57 Stat. 45, as amended; 50 U. S. C., Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such Act of March 24, 1943, as amended.

(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.

* * * * *

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Supreme Court of the United States

OCTOBER TERM, 1951

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SUPREME COURT, U.S.

No. 401

KONRAD G. JOHANSEN,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR RE-HEARING

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

WILLIAM L. STANDARD,
Proctor for Petitioner,

By LOUIS R. HAROLDS,
A Member of the Firm.

LOUIS R. HAROLDS,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 401

KONRAD G. JOHANSEN, Petitioner, v. THE UNITED STATES OF AMERICA.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR RE-HEARING

KONRAD G. JOHANSEN, by WILLIAM L. STANDARD, his proctor, respectfully petitions this Honorable Court for re-hearing, alleging as follows:

I

The Court of Appeals had dismissed this suit by a divided Court, but without any analysis of the 1944 Amendment to the Compensation Act. This Honorable Court affirmed said dismissal, by a 5-4 decision on an opinion dated May 26, 1952.

II

Re-hearing is sought on the ground that this Honorable Court failed to consider the full impact of the 1944 Amendment of the Compensation Act on the petitioner's rights in that said amendment (58 Stat. 712) expressly provided for an election between compensation and any other pay-

ments from the United States to which the employee might be entitled by reason of his injury under any other Act of Congress.

The majority of this Honorable Court, in its opinion, construed the 1944 Amendment to the Compensation Act, as referring to a right of election between compensation on the one hand, and only vacation, sick, retirement, or similar benefits, on the other hand. The 1944 Amendment, however, does not contain any such words of limitation, nor is there anything in its legislative history which lends support to such an interpretation.

At the time the 1944 Amendment was adopted, there was already in existence the Public Vessels Act of 1925. Under the literal language of the Public Vessels Act, as the majority of this Honorable Court recognizes, a public vessel civilian seaman would seem to have a right to sue for damages, and the Courts had already held that there was a right to elect.

When Congress adopted the 1944 Amendment to the Compensation Act, it must therefore be deemed to have had in mind the remedy given by the Public Vessels Act, when it broadly and expressly provided for an election between compensation and any other payments "by reason of such injury or death under any other Act of Congress" (58 Stat. 712).

The statement contained in the opinion of the majority of this Honorable Court, on page 7 thereof, to the effect that Congress made no provision "for election between this remedy and any remedy that might be available under other Federal statutes", should therefore be re-examined in the light of the foregoing.

III

The legislative history of the 1944 amendment shows that the right of election which was made express therein, was intended primarily as a clarification and re-statement of existing recognized law (See pp. 5-6 of Petitioner's Reply Brief).

By this amendment (which was in effect at the time petitioner herein sustained his injury), Congress had merely inserted express language into the Compensation Act, which simply carried out the interpretation which the Courts had previously already given to that Act, ever since *Dahn* v. *Davis*, 258 U. S. 421.

The majority of this Court indicates, at p. 9 of its opinion, that prior to 1949, there was a divergence of view in the Courts as to the exclusiveness of the compensation remedy, and that this divergence extended to suits by government civilian seamen, seeking damages under the Public Vessels Act. However, the cases referred to by the majority of this Honorable Court, in support of that proposition, under footnotes 4 and 5, are readily and easily distinguishable except, perhaps, for *Lopez* v. *United States*, 59 F. Supp. 831 (S. D. N. Y., 1944). The *Lopez* case, unfortunately, does not contain many facts, or any careful analysis, and it does not appear clear from the District Court's opinion, whether the seaman involved there was a civilian, or a member of the military forces. Furthermore, it was decided October 10, 1944, and could not have affected the thinking of Congress, which had passed the amendment on July 1, 1944. The other cases may be commented upon as follows:

In *Posey* v. *Tennessee Valley Authority*, 93 F. (2d) 726 (C. C. A. 5th 1937), a shore-side laborer, constructing Wheeler Dam, was injured. The federal statute creating the Authority, provided that the Federal Compensation Act was to apply to government employees engaged on this

project. There being no other statute by which the government had consented to be sued for such injuries, the Court held that compensation was the man's exclusive remedy. At that time, the Federal Tort Claims Act had not yet been adopted by Congress, and the Public Vessels Act could not apply, since the laborer was not a civilian seaman employed by the government on a public vessel.

In *Parr* v. *United States,* 172 F. (2d) 462, a shore-side employee of the War Department was injured in 1945. The Federal Tort Claims Act having already been adopted, the Court held that he could elect between the remedy given by the Compensation Act, or sue for damages under the Federal Tort Claims Act.

In *Thomasen* v. *W. P. A.,* 47 F. Supp. 51, aff'd 138 F. (2d) 342, a W. P. A. shore-side employee was injured in 1948, which was prior to the enactment of the Federal Tort Claims Act. Since the W. P. A. was not a corporation for whose negligent acts the government had as yet waived liability, and since there was then no statute under which the man could sue for damages, compensation was properly held to be his exclusive remedy.

In *White* v. *T. V. A.,* 58 F. Supp. 776, a T. V. A. employee sued for Workmen's Compensation benefits by a suit in the Federal Court. The Court properly ruled that a claim for such benefits should be filed directly with the administrative agency set up by Congress for that purpose.

In *Lewis* v. *United States,* 190 F. (2d) 22, a government policeman was held to be in the same position as a member of the military forces injured in line of duty, and therefore entitled to benefits under the Workmen's Compensation Act, without the right to sue for damages. However, that case was decided in 1951, and would appear to have no bearing on the state of the law, as it was in 1944, when the Workmen's Compensation Act was amended, or in 1949, when it was again amended.

In *O'Neill* v. *United States,* 11 F. (2d) 869, aff'd 11 F. (2d) 871, the man involved was a member of the military forces, injured on active duty, and *Brady* v. *United States,* 151 F. (2d) 742, also involved a member of the military forces, and not a civilian, and so those cases have no bearing.

United States v. *Loyola,* 161 F. (2d) 126, held that a civilian seaman, employed by the government, had a right to elect between suing under the Public Vessels Act, or seeking a remedy under the Compensation Act.

Careful analysis of the cases, therefore, shows that at the time of the 1944 amendment of the Federal Workmen's Compensation Act, there was no divergence of views. On the contrary, the overwhelming weight of authority at that time, as shown by the cases previously adverted to in Petitioner's brief, was to the effect that such a seaman had a right to elect. The 1944 amendment to the Compensation Act ought therefore to be construed as meaning what it plainly says.

IV

The majority of this Honorable Court distinguished *Dahn* v. *Davis,* 258 U. S. 421, on the ground that there, the right to elect to sue the government for damages, was based on Section 10 of the Federal Control Act. But the right of election was derived by the Court in the *Dahn* case, from the Compensation Act, and not from Section 10. And Section 10 of the Federal Control Act, which gave railroad workers a right to sue for damages, gave no greater right than that given by Congress to maritime workers, by the broad and sweeping provisions of the Public Vessels Act.

V

The majority of this Honorable Court finally states that to allow public vessels' civilian seamen an election, while denying it to other merchant seamen, would seem discrim-

inatory. For that matter, to deny seamen employed by the government through the War Shipping Administration, a right of trial by jury, when it is allowed to seamen employed by private companies, is likewise discriminatory. Such decisions, however, must be made by Congress, under the legislative procedures, and should not be the function of the Courts.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant a re-hearing in the above matter.

Respectfully submitted,

WILLIAM L. STANDARD,
Proctor for Petitioner,

By LOUIS R. HAROLDS,
A Member of the Firm.

LOUIS R. HAROLDS,
of Counsel.

MOTION FILED JUN 9 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

LIBRARY
SUPREME COURT, U.S.

Nos. 401 AND 414

KONRAD G. JOHANSEN, *Petitioner*,

401 v.

THE UNITED STATES OF AMERICA

(On Writ of Certiorari to the United States Court of Appeals for the Second Circuit)

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, *Petitioner*,

414 v.

THE UNITED STATES OF AMERICA

(On Writ of Certiorari to the United States Court of Appeals for the Third Circuit)

Motion of Cora Mae Meyer, Administratrix of the Estate of Leslie W. Gray, Deceased, for Leave to File Brief in Support as Amicus Curiae in Support of Motion for Rehearing

MANDELL & WRIGHT,
200 Republic Building,
Houston 2, Texas,
Attorneys for Applicant

Of Counsel:
ARTHUR J. MANDELL

ALPHA LAW BRIEF CO., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

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---

NOW COMES CORA MAE MEYER, Administratrix of the Estate of Leslie W. Gray, Deceased, and respectfully prays leave to file brief in support of Petitioner's Motion for rehearing, as amicus curiae, in the above captioned case.

Your applicant has requested the written consent of counsel for petitioner in causes Nos. 401 and 414 and of respondent United States of America in the same cases, and it is believed that consent therefor will be filed with the Clerk of this Court by the time this brief is filed, since no reply for such consent has as yet been received.

Your applicant, Cora Mae Meyer, as Administratrix of the Estate of Leslie W. Gray, Deceased, has heretofore obtained judgment in the sum of Eleven Thousand Dollars ($11,000.00) against the United States by reason of the death of the said Leslie W. Gray, a member of the crew of a Public Vessel, the dredge BIDDLE, said death having been caused by the negligence of the owners and operators of the dredge BIDDLE, and the unseaworthiness of its equipment and in other respects more fully set out in the Findings of Fact and Conclusions of Law filed by the Honorable T. M. Kennerly, United States District Court, Houston Division, in accordance with Adm. Rule 46½. (See App. A.) The case is now pending on appeal in the United States Court of Appeals, Fifth Circuit, and is numbered in that court as 13803. One of the principal points upon which the United States, Respondent in cause No. 13803, relies upon for reversal consists of the proposition that "The sole and exclusive remedy of libellant for the death of Leslie W. Gray, deceased, is a claim for compensation benefits under the Federal Employees Act, 5 U. S. C. A., Sec. 751, et seq." The decision of this Honorable Court in Causes No. 401 and 414 vitally affects the Appellee's recovery in behalf of the beneficiary, the aged and dependent Father of Leslie W. Gray, Deceased. It is, therefore, apparent that the result of these cases before the Court may be controlling in Appellee's case, (Cora Mae Meyer, Administratrix,) and, she therefore, has a direct and vital interest therein.

Cora Mae Meyer, therefore, respectfully requests leave to file a brief as Amicus Curiae.

Attorney for Cora Mae Meyer,
Administratrix

BRIEF
for
Cora Mae Meyer, Administratrix, as Amicus Curiae

The opinion of this Honorable Court was rendered on May 26, 1952, with the Honorable Justice Black, the Chief Justice, Justice Douglas and Justice Minton dissenting.

Jurisdiction

The Court has heretofore taken jurisdiction of this case and the matter is therefore properly before it.

Question Presented

Should this Court disregard the plain and unambiguous language of the Act of 1916, 39 Stat. 742, U.S.C., Section 751 et seq., and by drawing from other and unrelated acts of Congress, deprive seamen employees upon public vessels of the United States of the express benefits Congress granted them.

Statement

Ever since the enactment of the original statute, (43 STAT. 1112, 46 U.S.C., Section 781, et seq.) employees on Public Vessels have had their election to sue under the Suits in Admiralty Act. Under such act they were, until this decision, entitled to compensatory damages, invariably exceeding the amount they may be paid under any Compensation Acts including the right to maintenance and cure, or proceed under the Compensation Act. This provision was so well entrenched that no one questioned it until the two cases now before this Court. Relying on such statute, seamen employees on Public Vessels have been permitted to take their pick, i.e., receive compensation benefits or sue for damages.

under the Public Vessels Act, or some other act. In the case in which your applicant Cora Mae Meyer is interested, Leslie W. Gray, deceased, met violent death by reason of negligence of those in charge of the dredge BIDDLE, and the unseaworthiness of its equipment.* Relying on the 30 year old practice of election your applicant took advantage of the more liberal law under the Suits in Admiralty Act, and, therefore, did not file a claim for Compensation but proceeded in a suit in Admiralty, as a result of which judgment in the sum of $11,000.00 was rendered by the trial court. See the District Judge's conclusions of law, Appendix A.

All such persons obviously relying on the 30-year old practice of being entitled to sue under the Suits in Admiralty Act did file such suits under the following authorities:

U. S. v. Loyola (CCA 9th Circuit), 161 F. 2d 126;
Jentry v. United States, 73 F. Supp. 899;
United States v. Marine (CCA 4th Circuit), 155 F. 2d 456.

Thus, your applicant here has relied, as she had a right to rely, on the decisions of the courts—proceeded under the Suits in Admiralty Act and did not file *any* claim for compensation since the filing of a claim would have, under some authorities at least, constituted an election. She, therefore, finds herself in position now that while she had followed the law, yet in view of the decisions of this Court in Causes Nos. 401 and 414, this Court having swept away the rights Congress granted for a cause of action under the Suits in

* Young Gray lost his life when a steel cable which held up a clutch weighing a number of tons parted causing the balance of the wire to reave through a sheave striking Gray causing him to be thrown up into the air and then against the steel deck of the vessel killing him.

Admiralty Act.

Moreover, the decision of this Court has now differentiated and discriminated between Federal employees working as seamen aboard vessels owned by the United States, thus under the Court's opinion employees on merchant vessels of the United States may have the benefit of the Suits in Admiralty Act but not so with the employees on Public Vessels. Actually, there is no difference between the duties, hours worked or conditions of employment. Yet, this Court, in the face of the clear, plain meaning of the statute as enacted by Congress establishes an artificial difference, confusing in its scope, difficult in its application and unrealistic in its contents. It is important for this Court to carefully consider the difference between the Armed Forces of the United States and civil employees. FERRES v. U. S., 340 U.S. 135. Once that difference is understood then the Congressional mandate, Sec. 791, Title 5, U. S. C. A.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III Sec. 305, 63 Stat. 868."

becomes crystal clear and the Court's majority opinion amounts to judicial legislation a matter which under the Constitution this tribunal is prevented from engaging in.

The Court having conceded that the literal language of the Act would allow actions of the nature of those in causes Numbers 401 and 414, there is obviously no ambiguity and,

therefore, no reason for attempting to interpret or construe a statute. Congressional intent must be gathered from the words that Congress has spoken. Such words being clear and unambiguous, this Court has not constitutional right to attempt a construction directly contrary to the words employed by Congress.

Though your Applicant may be but one who would file this brief in Amicus Curiae in support of the Motion for Rehearing there are literally thousands of these cases now pending, and if this decision were to be allowed to stand thousands of widows and other dependents would be deprived of recovery under the suits in Admiralty Act.

Since Section 791, Title 5 specifically excepts seamen as defined in Section 1291 of Appendix to Title 50, i.e. merchant seamen. If Congress had intended only to except merchant seamen, subdivision (b) of Section 791 would not have been enacted. Thus by express legislative action Congress excepted all masters and members of the crew of any vessel from the exclusive remedy of the Compensation Act.

For the foregoing reasons it is respectfully prayed that this Honorable Court grant the Motion for Rehearing heretofore filed in this cause and reverse the decision in Causes No. 401 and No. 414.

Respectfully submitted,

MANDELL & WRIGHT,
200 Republic Building,
Houston 2, Texas,
Attorneys for Applicant

Of Counsel:
ARTHUR J. MANDELL

APPENDIX A

157 FINDINGS OF FACT AND CONCLUSIONS OF LAW PREPARED AND FILED BY THE TRIAL JUDGE UNDER ADMIRALTY RULE 46½

(Filed December 21, 1950)

(Title Omitted)

Statement of the Case.

As tried, this is a suit by L. W. Gray, Administrator of the Estate of Leslie Winston Gray, deceased (called Libellant for brevity), against the United States of America, Respondent, for damages claimed to have resulted from an injury to and the death of Leslie Winston Gray (for brevity called Gray), a member of the crew of the Dredge Biddle, owned and operated by Respondent, on or about July 28, 1949. The damages sought are for the pain and suffering of Gray from the time he received his injuries until his death, damages sustained by Gray's father by reason of Gray's death, and "damages suffered by the Estate" of Gray by reason of his injuries and death. The main trial was on or about October 3 and 4, 1950, but the case was by agreement kept open for other evidence, briefs, etc. until December 15, 1950, on which date it was submitted.

The case was tried on Libellant's Second Amended Libel filed September 28, 1950, but since the main trial, Libellant has filed (December 14, 1950) his Third Amended Libel, in which he in Paragraph IV thereof says:—

"Libellant further alleges that the said dredge BIDDLE was a Public Vessel of the United States, and that

this Libel is instituted under and by virtue of the authority given under the Act of March 9, 1920, Chap. 94, 41 Stat. 525 (Title 46 U.S.C.A., Secs. 741-752), commonly called the Suits in Admiralty Act of March 3, 1925, and Chap. 428, Sec. 1, 45 Stat. 112 (Title 46, U.S.C.A., Secs. 781-790), commonly called the Public Vessels Act; or in the alternative Chap. 20, sections 741 to 752, inclusive, Title 46, U.S.C.A., as well as the Death on the High Seas Act, Title 46, U.S.C.A., Sec. 761, et seq., and the Death Statute of the State of Texas, Art. 4671, Vernon's Annotated Statutes.

Libellant would show that the injuries sustained by the said Leslie Winston Gray which resulted in the death of the said Leslie Winston Gray were caused and brought about by the unseaworthiness of the dredge BIDDLE, its appurtenances, tackle, gear and especially the line or cable to which the ball joint was connected and dependently, as well as through the negligence and carelessness of the Respondent."

Findings of Fact.

(a) Gray, a young unmarried man, received injuries resulting in his death while employed as a member of the crew, i.e., a bin-tender, aboard the Dredge Biddle, owned and operated by the United States of America in navigable waters of the United States. He died intestate and without issue about ten minutes after his injury. The evidence discloses that his injury and subsequent death were without doubt the result of the unseaworthy condition of the Dredge Biddle and the negligence of those in charge of her.

(b) Libellant in Paragraph I of the Libel says that he brings this action:—

"against the Respondent, United States of America, a sovereign power, owner and/or operator of the Dredge BIDDLE, which was then and there a self-propelled

steam vessel operated under the jurisdiction of the Corps of Engineers, Galveston District."

Such allegations are found to be substantially correct.

(c) The following allegations in Paragraph III of Libellant's Libel are found to be substantially true and correct:—

> "Libellant would show your Honorable Court that the Dredge BIDDLE was and still is a self-propelled steam vessel and in excess of 351 feet in length and 60 feet beam, carrying a crew of 79 men having been used and now being used for dredging operation in order to maintain the navigability of the Galveston Harbor."

(d) Libellant has set forth in his brief a substantially correct statement, with slight immaterial variations, of the manner in which Gray was injured, which I adopt and quote it in part (emphasis mine):—

> "The Dredge BIDDLE is a modern seagoing vessel. (Res. Ex. No. 7 & 10). It is equipped with a drag pipe 103 feet in length, weighing a total of approximately forty (40) tons. About one-third of the way from where the pipe comes out from the side of the vessel there is what is known and has been designated as a ball joint. The ball joint itself weighing approximately eighteen (18) tons. (Lib. Ex. No. 1). At the place where the ball joint connects the two pipes it is held up by a block, pulleys and lines. (Res. Ex. No. 6). The end of the pipe known as the drag head is similarly held up. The vessel is equipped with an electrically operated clutch by which clutch the ball joint or drag head is raised or lowered to any desired position. The clutch has not been working properly for many months prior to the fatal day of July 28, 1949, and notice of this condition has been given to and was known by both the Master of the BIDDLE and its Chief Mate Gillikan a long time prior to July 28, 1949.

On the morning of July 28, 1949, the Master ordered the members of the crew to slacken the lines holding the ball joint and to run a line, commonly called a safety line from the davit some twenty-four (24) feet above the ball joint to the ball joint below for the purpose of holding it up while the lines which ordinarily hold it were being re-reaved on the drums on the upper deck. (Lib. Ex. No. 4). About twenty-five or thirty feet aft from where the deceased, Leslie W. Gray was standing, as shown by way of example on Libellant's Exhibit No. 4, there is a fairlead through which the regular lines holding up the ball joint run before they get on the drum. At the end of said fairlead or 'guidesheave stand' there are two heavy steel clips placed there so that the lines may run straight to the drum. The purpose of which is to hold the lines in place in the event of an emergency such as the ball joint falling suddenly, thus stopping the lines running to the drum from suddenly becoming taut and whipping about and possibly injuring anyone nearby. (Testimony of Chief Mate Gillikan and Second Mate Norwell). When the Master ordered the crew to go through such operation without supervision by any officer—Mr. Norwell, the Second Mate being in his bunk asleep and the Chief Officer Gillikan ashore—an unidentified member of the crew put an eighteen (18') foot safety line through the davit above the ball joint, (See Res. Ex. 6) for the purpose of hooking on to a shackle on the ball joint. *Because the clutch was not in working condition and the ball joint could not be raised to where the eighteen (18') foot line could have reached it, it became necessary to obtain another five to six foot 1" wire cable and connect it to the eighteen foot (18') cable and then hook it on to the shackle on the ball joint. While the ball joint was suspended to the so lengthened cable, the six foot (6') line broke in the middle,* (See Lib. Ex. No. 3), causing the eighteen (18) ton joint to suddenly fall a distance of about four feet which in turn jerked the regular lines ordinarily

holding up the ball joint (See Lib. Ex. No. 6) whipping the lines taut, breaking the clips on the fairlead or 'guide sheave stand' and causing the cable to suddenly whip and become taut while Gray was guiding the line on the drum as shown on Libellant's Exhibit No. 4, striking him on the chest, knocking him up against the steel structure overhead, thence to the steel deck, breaking his neck by reason of which, about ten minutes later he died."

(e) I find that Respondent was negligent in the following particulars with respect to the 6-foot cable which was connected to the 18-foot cable, as stated, which acts of negligence were each a proximate cause of Gray's injuries and death, to-wit:—

In that the owner, master, officers and members of the crew were negligent in failing to supply a strong, staunch line or wire cable holding and attached to said ball joint.

In that the owner, master, officers, and members of the crew of said vessel were negligent in failing to use reasonably precautions to ascertain that said line was sufficiently strong to hold the weight of the ball joint.

In that the owner, master, officers and members of the crew of said vessel were negligent in allowing a defective or unseaworthy line or wire cable to be connected to and hold up the said ball joint.

In that the owner, master and officers in charge of the crew assigned to do this particular work were negligent in failing to inspect said extension line before attaching it to the ball joint in order to hold the weight thereof.

In failing to maintain said extension wire cable and chemically treating the same in such a manner that it would not break, part and give way.

In negligently permitting the use of a defective extension line to hold up the weight of the ball joint.

(f) I find that Respondent was negligent in the following particulars with respect to such clutch, which acts of negligence were each a proximate cause of Gray's injuries and death:—

In that the owner, master and officers of said vessel negligently failed to keep the clutch operating said drag pipe in a good working condition.

In negligently failing to test said clutch before leaving out to sea, without first testing that the clutch operating said drag pipe was in proper working condition.

In negligently failing to take the vessel back into Galveston for the purpose of having said clutch repaired instead of using the defective and otherwise unseaworthy line to hold up the ball joint.

In failing to maintain said clutch in a proper working condition so that it could have been used at the time and occasion in question.

(g) I find that Respondent was negligent in the following particulars with respect to such clips, which acts of negligence were each a proximate cause of Gray's injuries and death:—

In failing to have staunch, stout and sufficiently strong clips around the guide sheave stand.

In failing to inspect said clips before lowering the ball joint.

(h) Because of the condition of such 6-foot cable, such Dredge Biddle was unseaworthy.

(i) Because of the condition of such clutch, such Dredge Biddle was unseaworthy.

(j) I find Respondent was negligent in the following

particular as alleged by Libellant, which act of negligence was a proximate cause of Gray's injuries and death:—

> In that the owner, master, officers and members of the crew of said vessel were negligent in failing to supply Libellant a safe place in which to work.

(k) The evidence shows that the 6-foot wire or cable which was attached to the 18-foot wire or cable as stated had previously been spliced by Gray and one Nunnery. But Gray was not guilty of negligence, because the 6-foot cable did not break at the point or points where spliced, but elsewhere. There is nothing to show that Gray was in any way negligent or that he in any way caused the accident or his injury.

(l) Gray's father, L. W. Gray, was almost wholly dependent on him for support, and was damaged by his death and the loss of such support, etc., in the sum of Ten Thousand Dollars ($10,000). Gray lived for about ten minutes after he was injured, and the Administrator of his Estate is suing for damages he sustained by his pain and suffering during such ten minutes. I find such damages to be One Thousand Dollars ($1,000).

Other than the foregoing, no damages, etc. have been shown.

202 SUPPLEMENTAL FINDINGS OF FACT & CONCLUSIONS OF LAW FILED BY THE TRIAL JUDGE

(Filed March 16, 1951)

(Title Omitted)

Statement of the Case.

Reference is made to Findings of Fact and Conclusions of Law filed herein December 21, 1950, and to Supplemental Findings of Fact and Conclusions of Law filed herein January 24, 1951. From these it will be seen that it was held that L. W. Gray, who claimed to be the Adminstrator of the Estate of Leslie Winston Gray, Deceased, was not such Administrator, and could not, therefore, prosecute this suit. But that Cora Mae Meyer, Administratrix of such Estate, has been permitted to intervene and prosecute same. She on January 26, 1951, filed Fourth Amended Libel, and Respondent on February 15, 1951, filed its Answer thereto. Counsel have filed the following Stipulation:—

"January 30, 1951.

Hon. T. M. Kennerly, Judge
United States District Court
Southern District of Texas
Houston, Texas

RE: ADMIRALTY NO. 921—CORA MAE MEYER V. UNITED STATES OF AMERICA

Dear Judge Kennerly:

An order was presented to you pursuant to your Findings of Fact and Conclusions of Law filed Jan-

uary 24, 1951. In accordance with such order Libellant, Cora Mae Meyer, filed her intervention by way of an amended pleading which is now before the Court.

With the exception of introducing in evidence the orders of the County Judge Sitting in Probate of December 27, 1950, and January 8, 1951, certified copies of which are attached to the motion filed January 21, 1951, there is no further evidence that the Libellant wishes to offer; and neither does the United States of America, Respondent, wish to offer any further evidence—both parties stating that there is no further evidence to be offered at this time.

Libellant offers in evidence the orders of the Probate Court attached to the motion filed the 21st day of January, 1951, and respectfully asks the Court to consider the same properly introduced in evidence. In the event the Court desires that we have the Court Reporter mark these instruments as exhibits, we shall be pleased to do so.

In view of the foregoing, it is respectfully requested that the Court consider the case resubmitted as to the issues and matters still undisposed of.

Respectfully yours,

BRIAN S. ODEM
By (Sgd) W. G. Winter, Jr.
Attorney for United States of America, Respondent.

MANDELL & WRIGHT
By (Sgd) Arthur J. Mandell
Attorneys for Libellant, Cora Mae Meyer."

The case has been submitted on Original and Supplemental Briefs.

Findings of Fact.

(a) I adopt the Findings of Fact contained in Findings of Fact and Conclusions of Law filed December 21, 1950, and Supplemental Findings of Fact and Conclusions of Law filed January 24, 1951.

Conclusions of Law.

1: — At the threshold of the case, we are met with the following proposition of Respondent:—

> "The sole and exclusive remedy of Libellant for the death of Leslie W. Gray, deceased, is a claim for compensation benefits under the Federal Employees' Compensation Act (5 U.S.C.A. 751, et seq.)

The cases upon which Respondent relies are Brooks v. United States, 337 U.S. 49. Feres v. United States, 340 U.S. 135. O'Neal v. United States, 11 Fed. (2nd) 869, aff. 11 Fed. (2nd) 871. Posey v. Tennessee Valley Authority, 93 Fed. (2nd) 726. United States v. Marine, 15[illegible] Fed. (2nd) 456. Johnson v. United States, 89 Fed. Supp. 6[illegible]. Frader v. United States (D.C.N.Y. 1950). Federal Employees' Compensation Act. 5 U.S.C.A. 751, et seq.

I do not think any of these cases support Respondent's contention. Also under the evidence, there has been no election to take under such Compensation Act.

2:—Under the foregoing Findings, Libellant is entitled to recover $10,000 damages for the death of Leslie Winston Gray, and $1000 damages for pain and suffering which he underwent before his death.

Judgment will enter for Libellant accordingly. Let proper Decree be drawn and presented.

/s/ T. M. KENNERLY
Judge

205 ORDER FOR JUDGMENT

(Entered March 16, 1951, page 397, Vol. 40, Civil Orders)

"3-16-51: Judgment for Libellant, Cora Mae Meyer, Administratrix of Leslie Winston Gray deceased, for $11,000.00 as per Findings of Fact and Conclusions of Law, and two supplements thereto filed. Clerk will notify counsel to prepare & present appropriate decree within five days. T.M.K."

LIBRARY
SUPREME COURT, U.S.

MOTION FILED JUN - 9 1952

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 401 & 414

KONRAD G. JOHANSEN,
Petitioner

v. No. 401

UNITED STATES OF AMERICA
On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner

v. No. 414

UNITED STATES OF AMERICA
On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION AND PETITION OF HERBERT L. JOHNSON AS AMICUS CURIAE FOR REHEARING

R. ARTHUR JETT
Norfolk, Virginia
Counsel for Petitioner

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 401 & 414

KONRAD G. JOHANSEN,
Petitioner

v. No. 401

UNITED STATES OF AMERICA

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner

v. No. 414

UNITED STATES OF AMERICA

MOTION AND PETITION OF HERBERT L. JOHNSON AS AMICUS CURIAE FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

Your Petitioner, Herbert L. Johnson, who was the successful libellant in the case of Johnson v. United States (4 CCA, 1950), 186 Fed. (2d) 120, as amicus

curiae, respectfully moves this Honorable Court for leave to file this, his petition for rehearing, in the above entitled causes in which the opinion of this Court was rendered on May 26, 1952, and in support of said motion alleges as follows:

REASONS FOR GRANTING REHEARING

1. Your Petitioner, Herbert L. Johnson, was employed by the United States Maritime Commission, Norfolk, Virginia, on September 3, 1946, and thereafter assigned duties as a deckhand aboard the Commission's Patrol Boat No. Q-14, which vessel was used for patrolling the James River Fleet of laid-up merchant vessels. On October 13, 1946, and while Your Petitioner was engaged in pumping the vessel's bilges the officer in charge of said vessel endeavored to start the vessel's engines, causing an explosion and fire thereon. Your Petitioner suffered severe and painful injuries when he became enveloped in flames and escaped death by throwing himself into the waters of the James River from where he was subsequently rescued.

2. Petitioner instituted an action in the United States District Court for the Eastern District of Virginia, Norfolk Division, by filing a libel in personam against the United States of America as owner of Patrol Boat No. Q-14, to recover damages for injuries received as result of the explosion aboard said vessel. Petitioner proceeded under an Act of Congress approved March 23, 1925, commonly known as the Public Vessels Act, 46 U.S.C.A., Section 781, 790, inclusive, and alleged a cause of action under an Act of Congress approved June 5, 1920, commonly known as the Jones Act, Title 46 U.S.C.A., Section 688.

3. The United States of America filed exceptions, exceptive allegations and a motion to dismiss, alleging in substance that a seaman serving aboard a public vessel had no right to sue the United States under the Public Vessels Act, but was limited to the acceptance of compensation under the Federal Employees Compensation Act of 1916, 39 Stat. 742, Title 5 U.S.C.A. Section 751, et seq.

4. The United States District Court for the Eastern District of Virginia, Norfolk Division, determined that Your Petitioner was not compelled to accept compensation as above mentioned, but had the optional right to sue his employer, the United States of America, in admiralty for damages, 89 Fed. Supp. 65. From the determination of this issue by the District Court the United States of America appealed.

5. The United States Court of Appeals for the Fourth Circuit affirmed the District Court and determined that a seaman serving on a public vessel of the United States was entitled to recover under the Public Vessels Act for such injuries, notwithstanding that he was entitled to compensation under the Federal Employees Compensation Act, 186 Fed. (2d) 120.

6. The cause was remanded to the United States District Court for the Eastern District of Virginia, Norfolk Division, for trial on the merits.

7. Further proceedings were had in the United States District Court for the Eastern District of Virginia, Norfolk Division, on October 26, 1951, and findings of fact, conclusions of law and a final order were entered on December 17, 1951, awarding to Your Petitioner a judgment in the sum of Twelve Thousand

Three Hundred Forty-six Dollars and Three Cents ($12,346.03).

8. The United States of America noted an appeal from this award and said cause is now pending on appeal before the United States Court of Appeals for the Fourth Circuit.

9. Your Petitioner anticipates that the United States Court of Appeals for the Fourth Circuit will re-examine the right of a seaman serving on a public vessel to sue the United States of America under the Public Vessels Act in the light of the opinion of this Court in the above entitled causes rendered on May 26, 1952.

10. Your Petitioner has studied the opinion of this Court rendered on May 26, 1952, and believes that his views which were so carefully weighed and considered by the Court of Appeals for the Fourth Circuit in Johnson v. United States, supra, were apparently not fully presented to this Court. Therefore, Your Petitioner prays that he be afforded an opportunity to express his views to this Court so that the judgment which he has obtained against the United States of America in said case may not be lost.

11. Your Petitioner is advised and believes that there are numerous other persons in like position who will also suffer loss without having been afforded an opportunity to express their views on a question which vitally affects their interest.

12. Your Petitioner submits that this Court has liberally construed the language of the Public Vessels Act, Title 46, U.S.C.A. 781, 790, inclusive, in *Canadian Aviator, Ltd. v. U. S.* (1945), 324 U. S. 215, 65 S. Ct.

639, 89 L. Ed. 901, and *American Stevedores v. Porello* (1947), 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011. This liberal construction should not now be constricted in the absence of Congressional intent. This Court has indicated that the Legislative history of that Act is silent as to such intent.

CONCLUSION

Equity and justice requires that this Court grant a rehearing in the above entitled causes so that Your Petitioner and all other persons similarly situated may be afforded an opportunity to file their briefs and be heard in support of the right of a seaman serving on a public vessel to sue the United States of America under the Public Vessels Act.

Respectfully submitted,

R. ARTHUR JETT,
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

R. ARTHUR JETT,
Counsel for Petitioner

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IN THE

Supreme Court of the United States

No. 414.

October Term, 1951.

SAMUEL MANDEL, Administrator of the Estate of
ROBERT WILLIE DILLEHAY, Jr., Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

No.

October Term, 1951.

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Samuel Mandel, Administrator of the Estate of Robert Willie Dillehay, Jr., deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter.

THE OPINIONS OF THE COURTS BELOW.

Two opinions were filed by the District Court for the Eastern District of Pennsylvania; one by Judge McGranery on November 21, 1947, reported in 74 F. Supp. 754 (R. 23a), and the other by Judge Kirkpatrick on August 14, 1950, reported in 93 F. Supp. 692 (R. 61a). The opinion of the United States Court of Appeals for the Third Circuit was filed on August 16, 1951 and is reported in 191 F. 2d 164.

JURISDICTION.

This proceeding was brought under the provisions of the Public Vessels Act (46 U. S. C. 781), and the Suits in Admiralty Act (46 U. S. C. 741), claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed was rendered on August 16, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Are civilian seamen, who are injured in the course of employment on government vessels, entitled to bring an action under the Public Vessels Act or the Suits in Admiralty Act to recover the benefits afforded by the maritime law, or are they limited to the remedy under the Federal Employees' Compensation Act?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action for wrongful death under the Suits in Admiralty Act on behalf of the widow of a deceased merchant seaman.

The decedent, Robert W. Dillehay, was a member of the crew of the tugboat "L. T. 221", a government owned vessel which was manned by a civilian captain and crew from the Army Transport Service. He met his death on October 15, 1944, when the vessel was negligently navigated into a mine field outside the harbor of Cagliari, Sardinia, resulting in the destruction of the vessel with heavy loss of life.

The government moved preliminarily to dismiss this libel upon the ground that the widow had no right of action under the Suits in Admiralty Act or the Public Vessels Act, and contended that her sole remedy was under the Federal Employees' Compensation Act (5 U. S. C. 751 et seq.). That

motion was denied in an opinion by Judge McGranery holding that the widow had an election to claim damages under the former Acts or to accept compensation under the latter.

Prior to the trial, the government was ordered by the District Court to produce certain statements of witnesses regarding the disaster but the government filed a claim of privilege and refused to comply with the order. Chief Judge Kirkpatrick overruled the claim of privilege and directed that judgment be entered against the government and that the case proceed to trial on the question of damages. From that judgment, the government appealed to the Court of Appeals for the Third Circuit, assigning as error the decision overruling the claim of privilege, and the earlier decision of Judge McGranery denying the government's contention that the Federal Employees' Compensation Act provided an exclusive remedy for civilian seamen.

The Court of Appeals did not reach the question of privilege but reversed the judgment on the jurisdictional ground that there was no right of action under the Suits in Admiralty Act and the Public Vessels Act, and holding further that the widow's sole remedy was under the Compensation Act.

SPECIFICATIONS OF ERROR TO BE URGED.

The learned Court of Appeals for the Third Circuit erred in the following respects:

(1) In holding that the Court had no jurisdiction to entertain any suit for personal injury to or death of a civilian seaman in government employ, under the Suits in Admiralty Act or the Public Vessels Act;

(2) In holding that the sole and exclusive remedy for personal injury to or death of a civilian seaman in government employ is under the Federal Employees' Compensation Act;

(3) In departing from the established construction of the statutes involved and in relying upon irrelevant considerations and mistaken impressions as that: the compensation provides a more humane and fairer remedy than damage actions; the elimination of the damage action will remove an element of unfairness and discrimination against military personnel; that judicial review of the negligence of military personnel is an incongruous subject for litigation and undesirable from the standpoint of national defense.

REASONS FOR GRANTING THE WRIT.

(1) The Decision of the Court Below Creates a Direct Conflict With the Decisions of the Fourth and Ninth Circuits.

The Court below held that a civilian seaman, injured on a government vessel is limited to the remedy under the Compensation Act, and he is not entitled to the benefits under the Suits in Admiralty Act or the Public Vessels Act. The Fourth and Ninth Circuits have held exactly to the contrary.

In the case of *United States v. Marine*, 255 F. 2d 456 (C. A. 4), a United States Customs Inspector was injured in the discharge of his official duties while leaving a merchant vessel owned and operated by the United States. The Court of Appeals for the Fourth Circuit denied the contention that he was limited to the remedy under the Compensation Act and held that he had an election to accept the benefits under that Act or to bring an action for damages under the Suits in Admiralty Act. The same Court of Appeals in the case of *Johnson v. United States*, 186 F. 2d 120, most recently followed the same rule. There a civilian seaman engaged as a deckhand aboard a United States patrol boat, a public vessel, was injured while on duty, due to the negligence of a superior officer. The Court applied the rule

that the civilian seaman had an election to sue for damages under the Public Vessels Act or to accept compensation.

The Ninth Circuit Court of Appeals followed the same rule in *United States v. Loyola,* 161 F. 2d 126, where a civilian seaman became ill while serving on an army transport. He was held entitled to the benefits of the Public Vessels Act. In the case at bar, the Court below expressly refused to follow the rule adopted in the Fourth and Ninth Circuits, and held, in direct conflict with the decisions from those Circuits, that the civilian seaman's remedy is exclusively under the Federal Employees' Compensation Act, with no right to bring an action under the Suits in Admiralty Act or the Public Vessels Act.

Immediately prior to the time the decision below was rendered, the Court of Appeals for the Second Circuit adopted the same rule in *Johansen v. United States,* 191 F. 2d 162, holding in a split two-to-one decision that a civil service employee on an army transport could not bring any action under the Public Vessels Act, but was limited to the remedy under the compensation law.

The decisions of the Second and Third Circuits are thus in direct conflict with those of the Fourth and Ninth Circuits on a basic question involving the interpretation of three federal statutes. In order to insure the uniform operation of the federal legislation and to resolve the conflict among the several circuits, it is essential that this court exercise its right of review.

(2) The Holding of the Court Below That the Federal Employees' Compensation Act Provides an Exclusive Remedy Conflicts With the Decisions of the United States Supreme Court.

The Court of Appeals below made the specific finding that the Federal Employees' Compensation Act provided an exclusive and not an elective remedy. This Court has ruled to the contrary. In *Dahn v. Davis,* 258 U. S. 421, a railway

mail clerk in the employ of the United States was injured on a railroad operated by the Director General of Railroads. Suit for damages was brought against the Director General under the Federal Control Act (40 Stat. at L. 451 Chap. 25), who defended upon the ground that the Compensation Act provided the exclusive remedy. The Supreme Court denied the government's contention and ruled that the Compensation Act afforded an elective and not an exclusive remedy. The Court held that those employees who are injured by the fault of the government now have a choice of remedies: they can elect to accept compensation or they can sue for damages.

In *Brooks v. United States,* 337 U. S. 49, two army servicemen, while on leave, were struck by an army truck driven by a civilian employee of the Army. The Supreme Court held that the injured army men had the right to bring an action under the Tort Claims Act (28 USCA 1948 ed. 2671), and this right is in addition to all other rights enacted for the benefit of servicemen. In making an analysis of all relevant legislation, the Court again took occasion to point out that the remedy under the Federal Employees' Compensation Act is elective and not exclusive as the government here contends.

In *Brady v. Roosevelt Steamship Co.,* 317 U. S. 575, the suit was by a United States customs inspector for an injury sustained on a government owned vessel. The Court held that the customs inspector, a civilian employee, had the right to sue the United States under the Suits in Admiralty Act.

The conclusion reached by the Court below that the Federal Employees' Compensation Act provides an exclusive remedy, is thus not only in conflict with the decisions from the other Circuits, but it is also in direct opposition to the rulings of the United States Supreme Court.

(3) The Court Below Failed to Give Adequate Consideration to the Ordinary Meaning of the Statutes and to Their Legislative History.

The Court below did not render any analysis of the Statutes involved or of their legislative history, in making its interpretation, but relied upon what it deemed to be considerations of fairness and national security. Had the Court rested its decision upon the plain language of the Statutes and the expressed Congressional purpose, a different conclusion would have been reached.

The first authoritative expression was rendered by the Supreme Court in *Brady v. Roosevelt S. S. Co., supra,* where an examination of the Suits in Admiralty Act was made and the Court expressly stated that a right of action was given under that Act to a government employee injured on a government vessel. A comprehensive analysis of the legislation is set forth in the opinion of Chief Judge Groner in *United States v. Marine, supra.* Judge Groner first adverted to the Supreme Court decision in the *Brady* case and then proceeded to make his own analysis of the Suits in Admiralty Act, as follows:

> ". . . we have no manner of doubt from the plain words of the Statute, considered in the light of the ordinary rules of statutory construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, *which implies that the right is limited to persons outside the provisions of the Employees' Compensation Act, and it is a fair inference that if Congress had intended that result*

it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.'' (Emphasis supplied.)

The history of the legislation compels the same conclusion. Prior to the enactment of the Suits in Admiralty Act, government vessels in the merchant service were subject to attachment as well as privately operated vessels, much to the embarrassment of the government. Section 1 of the Act was designed to abolish the right to arrest government vessels, and, to compensate for the loss of that right, Section 2 of the Act substituted a right in personam against the government. The government was thus not creating a right of action for the first time, but rather it was substituting one form of remedy for another. In this situation the waiver of sovereign immunity must be regarded in a different light than ordinarily. Under Section 2 of the Suits in Admiralty Act countless suits for damages by civilian seamen have been brought against the government which would previously have been instituted against the vessels in rem. So clear is the seaman's right to sue the government under the Suits in Admiralty Act, that the innumerable actions brought under the Act were recognized by the government itself as being validly brought, and were not challenged until very recently. A small fraction of the cases brought against the government is set out in *Gibbs v. United States*, 1951 A. M. C. 119. From the very beginning the legislation was construed to preserve to civilian seamen on government vessels their rights under the maritime law, and all attempts to apply the Federal Employees' Compensation Act as an exclusive remedy have heretofore been consistently defeated.

Having failed in its efforts to bring federally employed seamen within the scope of the Compensation Act by judicial decision, the government sought to accomplish the same result by an amendment to the Compensation Act in 1949. Section 201 of the proposed amendment was designed to make the Act the exclusive remedy for all civilian employees of

the government. As originally framed, this section would have included civilian seamen and it would have nullified all of their existing rights under the maritime law. The seamen Unions and their representatives were not made aware of the proposed bill and they were not invited to the legislative hearings on the bill. The bill passed the House but it was blocked in the Senate when the seamen Unions appeared and entered a protest. The Senate Committee, after further consideration, then adopted an amendment modifying Section 201 which made the Compensation Act the exclusive remedy, by adding the clause: "Provided, however, that *this subsection shall not apply to a master or member of the crew of any vessel*". Moreover, to make certain that the seamen's maritime rights would be preserved, without exception, the Committee amended Section 305 by adding subsection (b) which provides: *"Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel"*.

The report which was submitted with the amendments, clearly recognizes that civilian seamen in government service possessed the right to bring an action under the Suits in Admiralty Act or the Public Vessels Act and it was just as clearly intended to preserve that right. In this connection the report shows (p. 13608 Cong. Rec.—Senate, September 30, 1949):

> *"Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomlished by the proposed amendment to section 201 of the bill, lest some other provision of the bill, which in some some way not now foreseen, might be construed to take away any election of remedies that seamen might now have.* The new subsection would make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen what-

ever rights they now have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compensation Act being made by this bill will be construed to negate or reduce any of the maritime rights and remedies of seamen."

By this amendment, the Congress expressly recognized that the seamen had an election between the benefits under the Maritime law and those under the Compensation Act. The amendment maintains the status quo by specifically withdrawing the seaman from the exclusivity clause and by expressly reserving all maritime rights to the seamen.

It is pertinent to add that the very inclusion of the exclusivity clause into the body of the Act for general application significantly emphasizes the contention that the Compensation Act was previously not regarded as an exclusive remedy generally, and the amendment was intended to change the picture and make the Act the sole remedy wherever it was applicable. The fact that the seamen were excluded from the exclusivity clause is proof positive that the seamen were never before limited to the Compensation Act and it was not intended that they should be by the amendment.

The whole history of the legislation discloses that Congress intended to maintain the seamen in statu quo in the enjoyment of their maritime rights. They had a remedy prior to the enactment of the Suits in Admiralty Act and the Public Vessels Act, for the enforcement of those rights by an action in rem against the vessel. The same Act, which abolished that remedy, created a new personam remedy in favor of civilian seamen in government employ for the enforcement of all maritime rights against the United States. The language of the Act plainly conveys this interpretation. The Courts so construed it, and, from the date the Suits in Admiralty Act was enacted until recent years, many thousands of cases have been brought and judicially determined upon that basis. The government attempted first, in recent

years, to wipe out the civilian seamen's maritime rights against the government through the courts, and, failing in which, the government attempted to accomplish the same result by means of legislation in the form of the amendment above referred to. Since that effort likewise proved unsuccessful, the government is now back in the Courts asking the Judiciary to do what the Congress has refused to do.

The Court below departed from the established rule without giving adequate consideration to the plain meaning of the legislation involved, and to the Congressional intent, and erroneously relied upon irrelevant and mistaken impressions. It is essential that this court exercise its supervisory powers to correct the erroneous construction which the Court below has placed upon important Federal legislation.

(4) The Court Below Relied Upon Irrelevant Considerations and Mistaken Impressions in Departing From the Established Rule of Construction.

The first of the reasons assigned in support of the conclusion of the Court below is that the Compensation Acts generally are more "humane, fair and adequate and a more enlightened form of remedy". If it were to be assumed arguendo that such is actually the fact, it is apropo to state that it is not the prerogative of the Courts to ignore the existing law and read into the statutes a meaning never intended by Congress. Such changes in the law are exclusively the function of the legislative branch, and the action of the Court below clearly trespasses upon the Congressional domain.

Moreover, the Court below is completely in error in its characterization of the Compensation Acts. Experience has proven that the remedy is neither enlightened nor adequate or fair. The Compensation Acts have not eliminated the necessity for litigation as is generally assumed but, on the contrary, they have resulted in more and protracted liti-

gations than is involved in other remedies. Mr. Justice Murphy in *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469, characterized the remedy as "deceptively simple and litigiously prolific". Many claims are daily denied because of inherent weakness in the system of workmen's compensation which invites all sorts of defenses. Some of these defenses and weaknesses are analyzed in an able and comprehensive article by Samuel B. Horovitz, Esquire (3 NACCA Law Journal 15), leading authority on workman's compensation law.

Nor does the litigation cease even after a claim is allowed. For the employer periodically files petitions to terminate or cut down the award, thereby requiring the claimants to obtain the services of counsel and physicians in opposition to those of the employer. Because of the employee's financial inability to frequently procure such professional services, his claim often falls by the wayside or is sharply reduced.

As a direct consequence of the Compensation Acts, the standard of living of injured employees and their families has been reduced to incredibly low levels and they frequently become the burdens of the community.

It was because of such considerations that the English law was recently changed in order to improve the plight of the injured employee. The "Law Reform (personal injuries) Act", 1948 (11912 Geo. 6, C. 41), amends the law and gives to the injured employee the right to recover damages *in addition* to the right to recover one-half of the benefit under the Compensation Laws. This form of remedy is much closer to being an enlightened one and more nearly approaches the remedies under the Maritime Law such as maintenance and cure and damages. For example, the obligation to provide maintenance and cure covers illnesses as well as injuries, and it need not arise out of the employment so long as the illness or injury is manifested during the employment. The Compensation Laws do not provide relief for illnesses and require further that the injuries be

caused by the employment. The right to maintenance and cure alone by far exceeds the remedy under the Compensation Acts. It is broader in scope and more liberal in amount.

These features are simply some of many differences between the two systems of law demonstrating that the Compensation Laws do not nearly begin to approach the other system as a realistic and enlightened form of remedy.

It is worthwhile bringing to this Court's attention the fact that the Federal Employees' Compensation Act, in addition to possessing the weaknesses already adverted to, is unique in that it virtually provides an ex parte determination of the right to compensation. The cases are decided upon information obtained by an investigator, there is no testimony taken, the information is not obtained under oath and there is no semblance of a hearing. The claimant is not heard, nor is he permitted to know what information is in the file, or the "evidence" which forms the basis of the decision. He is precluded from examining his own medical records at the Marine Hospitals or U. S. Public Health Service in claims under the Federal Employees' Compensation Act. It is into this orbit that the government seeks to draw the civilian seamen and deprive them of the truly enlightened rights and remedies under the maritime law.

The second reason advanced by the Court below in support of its decision is that the inclusion of civilian seamen into the Compensation Act removes an element of unfairness and prevents discrimination against the military personnel in the armed forces. The rationale is that military personnel cannot sue the government for damages on account of injuries sustained in the course of duty and, therefore, it would be discriminating against these men if the civilian seamen were permitted to recover damages for injuries sustained in the course of their employment. It is respectfully submitted that this type of reasoning also is

a proper consideration for the legislative body and not for the Judiciary. The Courts may not ignore the clear intent of a Statute because of what they deem to be considerations of fairness.

In passing, it must further be noted that there is no such unfairness or discrimination as was assumed by the Court below. The Congress, in its wisdom, has enacted from time to time a series of remedies for military personnel, which only they may take advantage of, such as pensions, disability benefits, insurance provisions, educational and vocational training benefits, extraordinary medical benefits, preferences in civil service jobs, unemployment allowance and many others. Congress did not extend those benefits to civilians but enacted entirely different remedies consistent with the existing law applicable in private industry. Congress made it very clear in the Suits in Admiralty Act and the Public Vessels Act that civilian seamen engaged on government vessels shall be regarded exactly the same as seamen in private employment and governed by the same laws. It is wholly unrealistic under the circumstances to say that an undue advantage is given to civilian seamen or that any discrimination is practiced against military personnel. Congress provided for each group in a manner that it considered appropriate and it is not the prerogative of the judiciary to change or defeat the legislation.

Finally, the Court below reasoned that it is not in the public interest to have judicial review of the question of negligence of military personnel; that it is an incongruous subject for litigation and undesirable from the standpoint of national defense. Here again the Court below was stepping out of its field and invaded the legislative. It must be noted first that the vessel was manned and commanded by civilian seamen, and the negligence involved relates to the conduct of a civilian captain. The Court was not asked to evaluate the conduct of a military commander. But in any event, even if a cause of action should be predicated

upon the alleged negligence of military personnel, it is difficult to see why it would be incongruous or inimical to the national security for a court to test the facts in accordance with our democratic procedures. The government engaged the crew as civilian seamen and the Congress had provided that under these circumstances the government must be regarded as any other employer in private industry and subject to the same obligations. In *Brooks v. United States, supra,* an army serviceman was injured while off duty by an army truck and brought suit for damages under the Tort Claims Act. The government challenged the serviceman's right to bring an action under the Tort Claims law and "envisaged dire consequences" if a battle commander's judgment should be questioned. The Court rejected the "fear" argument and pointed out that there was no question of a battle commander's judgment at issue, and that question would be decided when and if such an issue is presented. The Court sustained the serviceman's right to sue the government for the negligence in operating an army truck.

All of the reasons which impelled the Court below to hold that the Compensation Act is the exclusive remedy for civilian seamen in government employ, fail to withstand analysis both because they are based upon erroneous assumptions and premises, and because that kind of reasoning is appropriate for the legislative and not the judicial branch of the government. All these considerations were presented to the Congress in connection with existing legislation and carefully considered.

Congress made it perfectly clear in the Suits in Admiralty Act and the Public Vessels Act, that the liability of the United States in connection with civilian seamen employed on government vessels is precisely the same as though the United States were a private operator. Congress did not impair any of the seamen's maritime rights by the enactment of the Compensation Act, but on the contrary, expressly reserved those rights and afforded an elec-

tion, giving the seamen a choice of remedies. The decision of the Court below directly violates the clearly expressed intent of the legislation and it is in direct conflict with the applicable decisions of this Court and of the Fourth and Ninth Circuits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should exercise its right of review to resolve the conflict caused by the decision below and grant this petition for a writ of certiorari.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 414.

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE DILLEHAY, JR., Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

October Term, 1951.

No. 414.

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

THE OPINIONS OF THE COURTS BELOW.

Two opinions were filed by the District Court for the Eastern District of Pennsylvania; one by Judge McGranery on November 21st, 1947, reported in 74 F. Supp. 754 (R. 23a), and the other by Judge Kirkpatrick on August 14th, 1950, reported in 93 F. Supp. 692 (R. 61a).

The opinion of the United States Court of Appeals for the Third Circuit was filed on August 16th, 1951, and is reported in 191 F. 2d 164 (R. 100).

JURISDICTION.

This proceeding was brought under the provisions of the Public Vessels Act (46 U. S. C. 781), and the Suits in Admiralty Act (46 U. S. C. 741), claiming damages for wrongful death.

The judgment of the Court of Appeals was entered on August 16th, 1951. The petition for a writ of certiorari was filed on November 6th, 1951, and it was granted on January 2nd, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Where a federally employed merchant seaman is killed in the course of his employment aboard a government-owned tugboat in the Army Transport Service, which was commanded by a civilian Captain and manned by a crew of merchant seamen, the question presented is:

Whether the widow of the deceased seaman may bring an action for damages under the Public Vessels Act or the Suits in Admiralty Act, or whether the widow is limited to the remedy under the Federal Employees' Compensation Act.

STATUTES INVOLVED.

Federal Employees' Compensation Act (1916), 5 U. S. C., Sec. 751:

"The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death".

Federal Employees' Compensation Act Amendment of 1949, 5 U. S. C.
Sec. 757 (b):

"The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instru-

mentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel".* (Italics added.)

SEC. 791-4 (b):

"Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel". (Italics added.)

Suits in Admiralty Act (1920), 46 U. S. C., Chap. 20.

SEC. 741:

"No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

SEC. 742:

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . ."

Public Vessels Act (1925), 46 U. S. C., Chap. 22.

SEC. 781:

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920".

SEC. 782:

". . . Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 [Suits in Admiralty Act] of this title or any amendment thereof, insofar as the same are not inconsistent herewith . . ."

STATEMENT OF THE CASE.

This action was brought under the Public Vessels Act and the Suits in Admiralty Act to recover damages for the wrongful death of a merchant seaman, in behalf of the widow.

The alleged facts giving rise to the cause of action are briefly as follows:

The tugboat "L. T. 221" was a government-owned vessel in the Army Transport Service. It was commanded by a civilian Captain and manned by a crew of merchant seamen, including the decedent who was the vessel's third assistant engineer.

On October 14, 1944, the vessel was proceeding into the Harbor of Cagliardi, Sardinia, when it suffered a violent explosion which was allegedly due either to defective boilers or to the fact that it was negligently navigated into a mine field (R. 4a). The decedent lost his life in that disaster.

Before answering to the merits, the Government moved to dismiss the libel upon the ground that the widow was limited to the remedy under the Federal Employees' Com-

pensation Act. That motion was overruled by District Judge McGranery who held that the widow had an election either to accept compensation or to proceed with her tort action under the Suits in Admiralty Act or the Public Vessels Act (R. 23a).

After an answer to the merits was filed, libellant, in preparation for trial, filed a motion for the production of certain statements of witnesses. The War Department had ruled that the information requested was not secret or confidential and had approved disclosure (R. 92a). District Judge Kirkpatrick held that good cause had been shown and ordered disclosure of the documents (R. 63a). The Government then filed a claim of privilege and refused to comply with the Court's order upon the ground that production of the statement would be contrary to the public interest (R. 65a). The District Judge overruled the Government's claim of privilege, but the Government, nevertheless, refused to comply with the Court's order. The Court thereupon entered judgment against the Government and directed that the case proceed to trial solely on the question of damages (R. 98a).

The Government appealed from that judgment assigning as error, (a) the earlier ruling of District Judge McGranery holding that the widow had a choice of remedies, and, (b) the later Order of Judge Kirkpatrick overruling the Government's claim of privilege.

The Court of Appeals reversed the judgment of the District Court solely upon the ground that the Federal Employees' Compensation Act was the exclusive remedy available to the widow and that the libellant had no right of action under the Public Vessels Act. The Court of Appeals did not consider or decide the question of privilege, which was the basis for the entry of judgment.

The holding of the Court of Appeals is based upon three considerations:

(a) Since the Compensation Act did not contain an express provision making it an optional remedy, it must

be construed as an exclusive one. In support of this premise, the Court stated that compensation acts generally provide a more humane, adequate and fair method, and the natural inference with respect to the Federal Employees' Compensation Act is that it represents a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages (R. 103-104);

(b) By making the Compensation Act the exclusive remedy, it will remove an element of unfairness in that to permit merchant seamen to recover damages under the Public Vessels Act, would be to discriminate in their favor against military personnel (R. 104-105);

(c) It is not in the public interest to have judicial review of questions of negligence in the conduct of military or semi-military operations (R. 105).

SPECIFICATION OF ERRORS.

The learned Court of Appeals for the Third Circuit erred in the following respects:

(1) In holding that the Court had no jurisdiction to entertain any suit for personal injury to or death of a civilian seaman in government employ, under the Suits in Admiralty Act or the Public Vessels Act;

(2) In holding that the sole and exclusive remedy for personal injury to or death of a civilian seaman in government employ is under the Federal Employees' Compensation Act;

(3) In failing to construe the relevant statutes in accordance with the plain language and rationale of the legislation and with the intention of Congress; and in relying upon mistaken and erroneous impressions, as that the Compensation Act provides a more enlightened form of remedy, that it discriminates in favor of merchant seamen against military personnel, and that it is not in the public interest to have judicial review of questions of negligence in the conduct of military or semi-military operations.

SUMMARY OF ARGUMENT.

The history of the Federal Employees' Compensation Act reveals that it has never been regarded as an exclusive remedy for any federal employees, and this is particularly so with respect to federally employed maritime seamen. From the time of its enactment in 1916, it has been specifically held many times that the Compensation Act does not bar suits for damages against the United States by federal employees under other statutes, such as the Federal Control Act of 1918, the Federal Tort Claims Act, the Suits in Admiralty Act and the Public Vessels Act. In its general application, the Compensation Act has been construed as an optional rather than an exclusive remedy.

The Suits in Admiralty Act was passed in 1920 under circumstances quite different from the ordinary case where the Government waives its sovereign immunity from law suits. Prior to that enactment, vessels which were government-owned were subject to attachment in rem proceedings just as were the vessels of private shipowners. Section 1 of the Suits in Admiralty Act was designed to abolish this right of attachment of government vessels. Section 2 of the Act substituted a suit in personam against the Government, in place of the rem action which was abolished, and the United States was made subject to suit under precisely the same circumstances as would impose liability upon private shipowners. The situation is thus different from the usual one where the Government sheds its sovereign armor and creates a liability where there was none before. Here, the seamen had a right of action before the Compensation Act, which was unaffected by that Act. The Suits in Admiralty Act changed that right into a personam action against the Government.

The clear language of the Suits in Admiralty Act encompasses the damage claims of seamen, and there is no suggestion or inference that it was made subject to the existing Federal Compensation Act. Had Congress in-

tended to exclude the seamen from the Act, or to impose any conditions upon their right to take advantage of the benefits under the Act, it is reasonable to assume that the Congress would have so stated in unmistakable terms. The fact that the Congress did not qualify the Act in any way as to exclude the seamen, is conclusive proof that it was not intended to make any distinction between the claims of seamen and any other claims which might be brought under the Suits in Admiralty Act. Indeed, so clear is the language of the Act, that the Government itself did not question the seamen's right to bring a damage action thereunder for about twenty-five years after the passage of that legislation. Numerous suits by federally employed seamen were allowed to proceed against the United States under the Suits in Admiralty Act, and the Federal Employees' Compensation Act was never advanced as a bar to those actions. It was not until 1946 that the Government first raised the question in the case of *United States v. Marine*, 155 F. 2d 456, in which case the Government's contention was flatly rejected. Thereafter the Government continued to raise the same question in other jurisdictions, but the Courts uniformly held that the Compensation Act did not bar an action by a federally employed seaman under the Suits in Admiralty Act, until the decisions of the two cases which are presently before this Court.

Further examination of the legislation confirms the view that Congress never intended to limit the seaman's rights under the Suits in Admiralty Act or the Public Vessels Act. In 1949 a Bill was introduced in Congress (H. R. 3191) generally liberalizing the Federal Employees' Compensation Act. Section 201 of that Bill was added to make the Compensation Act the exclusive remedy for all civilian federal employees in place of all other rights under any other statutes or laws. This was a significant recognition that the Federal Compensation Act, up to that time, was not an exclusive remedy as to any federal employee, let alone the merchant seamen.

As originally drafted, Section 201 of the Amendment of 1949 was broad enough to include federally employed seamen and it would have nullified all of their existing maritime rights. *This clause was changed in the Senate to make an exception of federally employed seamen and to preserve to them all of the rights which they enjoyed under the Maritime Law.* The Bill was enacted into law with that change.

By the 1949 Amendment, therefore, Congress confirmed the interpretation which had been placed on the original legislation, namely that federally employed seamen were entitled to the benefits of the Maritime Law under the Suits in Admiralty Act, and by that Amendment it was expressly provided in positive terms that those benefits of the Maritime Law should be preserved to all of these seamen.

Moreover, the Courts uniformly so interpreted the legislation from the adoption of the Suits in Admiralty Act in 1920, until 1951, when, in the two cases now before this Court, they departed from the settled rule. The reasoning of the Courts in the cases at bar fails to support the decisions.

The decision in the instant case was rested upon three grounds, the first of which is that the Compensation Act should be regarded as an exclusive remedy because it represents a more enlightened, humane and adequate form of remedy. This premise is unquestionably erroneous aside from the fact that it was not a proper basis for the Court to resist the clear mandate of the statute. Congressional Committees have, for many years, investigated this very point with a view toward enacting a compensation act for seamen, and it has been conclusively demonstrated in those hearings that the compensation acts do not begin to approach the remedies under the Maritime Law from the standpoint of liberality, adequacy or fairness.

The seamen's maritime right to maintenance and cure, which is not dependent upon fault or culpability, is itself a more substantial remedy than that afforded by the com-

pensation acts. It is broader in scope since it includes all illnesses and injuries which are manifest during the employment and need not be caused by the employment as is required under the compensation acts. In amount, the employer is required to pay the actual cost of maintenance which today has been fixed at $8.00 per day, while the compensation acts provide only a percentage of the earnings. The Maritime Law does not stop with the remedy for maintenance and cure, but it affords, in addition, a right of action for indemnity where the illness or injury is caused by the unseaworthiness of the vessel or its equipment, or by the negligence of the employer or his agents and employees.

In England, where the compensation system went into effect in 1897, the law has now been modified to allow the employee a right of action for damages, in addition to the remedy for compensation. Britain has thus followed the pattern of the Maritime Law in an effort to liberalize its system and to more fairly compensate the injured employee.

Congress has refused to enact a compensation act for seamen after a careful study of the problem. The Court below had no right to substitute its own judgment for that of the Congress in interpreting the federal legislation.

The second reason advanced by the Court below in support of its decision, is that to permit merchant seamen a remedy under the Public Vessels Act would, in effect, be discriminating against naval personnel. This reasoning is fundamentally unsound.

Congress has enacted much special legislation to cover military personnel, such as disability benefits, pensions, insurance provisions, extraordinary medical benefits, and many others, *none of which are applicable to merchant seamen.* It has enacted other separate legislation for the seamen. It was not the province of the Court below, under these circumstances, to construe the law differently from what Congress intended because of what the Court below felt were considerations of unfairness.

To carry out the reasoning of the Court below to its logical extreme, if an employee brought claim against his employer for overtime wages under the Fair Labor Standards Act, the claim would have to be denied because it would be unfair to the military forces fighting on some battle line who had no right to overtime compensation.

Congress alone is charged with the responsibility of determining and enacting appropriate legislation to govern its various subjects. It has done so in this field, and its wisdom in effecting the legislation under consideration may not be challenged by the judiciary.

The third and final reason relied upon by the Court below is that it is not in the public interest to have judicial review of questions of negligence in the conduct of military or semi-military operations. Here again the Court below was usurping the function of the legislative body.

Moreover, an examination of the cases brought under the Public Vessels Act and the Suits in Admiralty Act reveals that the liability is almost invariably predicated upon the unseaworthiness of the vessel or the negligence of a fellow servant. These cases do not involve situations where a battle commander's judgment is in issue, as the Court below assumed.

During the last war, practically all of the vessels were requisitioned by the Government and operated under General Agency Agreements. These vessels were manned and commanded by merchant seamen, although there was a complement of naval personnel aboard. These vessels proceeded in convoy under the command of the Navy and they carried war cargo and troops to the various battle fronts. They even participated in the Normandy invasion. In these situations, federally employed seamen were employed at the scene of the battle, and the dire consequences which the Court below envisioned, failed to materialize. The Government concedes that these federally employed seamen were and are entitled to sue the United States under the Suits in Admiralty Act. The same seamen who manned

these vessels for the War Shipping Administration also manned the vessels for the Army Transport Service. They were used interchangeably and the service in both was, from the practical standpoint, indistinguishable. If, as the Court below said, it was not in the public interest to afford seamen engaged in that service the right to take advantage of the benefits under the Suits in Admiralty Act, then it was just as necessary to extend the rule to War Shipping Administration seamen, as it was to those engaged in the Army Transport Service. Congress, however, made it perfectly clear that it did not consider it in the public interest to take away the maritime rights from the federally employed seamen. The fact that it has repeatedly rejected the attempts to place these seamen under the compensation acts, is ample proof that it did not consider it in the public interest to place these men under the Federal Employees' Compensation Act. The wisdom of that decision is not open to judicial review.

What has been said with regard to the Suits in Admiralty Act applies with equal force to the Public Vessels Act since, by Section 2 of the latter statute, all of the provisions of the Suits in Admiralty Act are incorporated into the Public Vessels Act.

ARGUMENT.

The Federal Employees' Compensation Act Was Not an Exclusive Remedy Prior to the 1949 Amendment.

Apart from the question as it relates to seamen, the Compensation Act, in its general application, has been regarded as an elective remedy rather than an exclusive one.

In *Dahn v. Davis,* 258 U. S. 421, a railway mail clerk in government employ was injured on a railroad operated by the Director General of Railroads. He brought suit for damages against the Director General under the Federal Control Act, 40 Stat. at L. 451, Chap. 25. The Government sought dismissal upon the ground that the mail clerk was limited to the remedy under the Federal Employees' Compensation Act. The Supreme Court held that the Compensation Act provided an elective remedy giving the employee a choice between the Compensation Act and a tort action for damages.

In *Brooks v. United States,* 337 U. S. 49, two army servicemen were struck by an army truck driven by a civilian employee of the Army. The Court held that the servicemen were entitled to bring an action for damages under the Tort Claims Act, in addition to all other rights enjoyed by military personnel. In examining all of the relevant legislation, the Court pointed out that the Federal Employees' Compensation Act is elective and not exclusive as the Government contends.

Insofar as seamen are concerned, from the time the Suits in Admiralty Act was adopted, it was taken for granted by all parties that federally employed seamen were entitled to the benefits of that Act without being limited by the Compensation Act. The history of the legislation proves that the Government shared this view. Numerous suits by seamen injured on government vessels were instituted every year, commencing in 1920, and they proceeded without any objection or discussion regarding the effect of

the Compensation Act.[1] In the case of *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575 (1943), the defendant took the position that the Suits in Admiralty Act provided the only remedy for injuries to seamen on government vessels, to the exclusion of any right of action against a private operator of the vessel. There was no suggestion that the Compensation Act had any bearing whatever on the proceedings. The Supreme Court stated in that case (p. 577):

> " and we may assume that the petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act."

Although the relevancy of the Compensation Act was not there considered, that expression significantly emphasizes the understanding, universally accepted by the Courts and the parties, including the Government itself, that the Suits in Admiralty Act provided a remedy for federally employed seamen against the Government. The fact that the Government did not raise the Compensation Act as a bar to the litigations is strong evidence of the Government's own understanding that the Compensation Act did not provide an exclusive remedy. This understanding, shared by the parties and the Courts, could only have originated from the legislation itself.

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1. Axtell v. United States, 286 Fed. 165 (E. D. N. Y., 1922); Unica v. United States, 287 Fed. 177, 1923 A. M. C. 455 (S. D. Ala. 1923); Morris v. United States, 3 F. (2d) 588 (2 Cir., 1924); United States Shipping Board Emergency Fleet Corp. v. O'Shea, 5 F. (2d) 123, 1925 A. M. C. 959 (App. D. C., 1925); Zinnel v. U. S. S. B. E. F. C., 1926 A. M. C. 632, 10 F. (2d) 47 (2 Cir., 1925); Hansen v. United States, 1926 A. M. C., 286 12 F. (2d) 321 (S. D. Ga. 1926); Maloney v. United States, 7 F. Supp. 14, 1928 A. M. C. 288 (S. D. N. Y. 1927); U. S. S. B. E. F. C. v. Greenwald, 1927 A. M. C. 308, 16 F. (2d) 948 (2 Cir., 1927); Stewart v. United States, 25 F. (2d) 869, 1928 A. M. C. 943 (E. D. La., 1928); Howarth v. U. S. S. B. E. F. C., 1928 A. M. C. 397, 24 F. (2d) 374 (2 Cir., 1928); Ives v. United States, 1932 A. M. C. 783, 58 F. (2d) 201 (2 Cir., 1932); Stratton v. United States, 1934 A. M. C., 1161, 8 F. Supp. 429 (S. D. N. Y., 1934); Helmke v. United States, 8 F. Supp., 521, 1934 A. M. C. 1592 (E. D. La., 1934); Carlson v. United States, 1934 A. M. C. 841, 71 F. (2d) 117 (5 Cir., 1934); Johnson v. United States, 1935 A. M. C. 165, 74 F. (2d) 703 (2 Cir., 1935); Smith v. United States, 1938 A. M. C. 977, 96 F. (2d) 976 (5 Cir., 1938); Desrochers v. United States, 105 F. (2d) 919 (2 Cir., 1939).

The Suits in Admiralty Act, which came four years after the Compensation Act, was designed to abolish one right of action and to create another in its place. Prior to that time, Government vessels could be arrested by a libel in rem in any case where a lien against the vessel existed. Seamen employed on Government vessels were thus able to obtain redress for their personal injuries by actions in rem against the offending vessels. Section 1 of the Suits in Admiralty Act abolished the right to arrest any vessel in which the Government had an interest. Section 2 of the Act substituted a remedy in personam against the United States and defined the limits within which it was intended to bind the Government. The same section provides that the Government may be sued in every case where, if the vessel had been privately owned, a suit could have been instituted against the private shipowner.

In the instant case, there is not the slightest doubt but that, if the vessel had been privately owned, a suit could have been instituted against the private owner. It follows that libellant has a right of action under the Suits in Admiralty Act.

The Amendment of 1949 Was Intended to Make the Compensation Act an Exclusive Remedy for All Federal Employees Except Seamen.

It was recognition of the fact that the Compensation Act was not an exclusive remedy which led the Government to introduce a Bill in Congress, (H. R. 3191) which, inter alia, attempted to make the Compensation Act the exclusive remedy for all federal employees, in place of all other rights against the United States. As originally drafted, the Act would have included civilian seamen and it would have nullified all of their existing rights under the Maritime Law. The seamen were not made aware of the effect of the Bill, and were not invited to the legislative hearings. The Bill passed the House but it was blocked in the Senate when

the seamen's unions entered a protest. The Bill was then referred back to the Senate Committee which, after further consideration, made a change in the Bill reserving to the seamen all of their maritime rights, and with this change, the Bill was adopted by both Houses of Congress.

The Report which was submitted by Senator Morse with the amendment to the Bill clearly explains the effect and purpose of the legislation as follows (p. 13608 Cong. Rec.—Senate, September 30, 1949):

> "Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits In Admiralty Act and Public Vessels Act, and, moreover, have been permitted an election to accept the benefits of the compensation in lieu of their maritime rights. The benefits to seamen under maritime law, which would be wiped out prospectively and to some extent retroactively by section 201 of the bill, are regarded as valuable rights by federally employed seamen, whose numbers exceed 16,000 at the present time. The representatives of maritime unions are now strongly urging, since the bill was placed on the Senate Calendar, that their right to sue the United States under maritime law be preserved and that they be kept in status quo. It would appear that none of the seamen's representatives were apprised of the implications of the bill insofar as it affects their maritime rights. Consequently none of the representatives of maritime labor appeared before the committees which considered the bill and upon a perusal of the hearings I find no evidence that the effect of the bill upon seamen was explored on the merits. I think this is particularly unfortunate, although undoubtedly inadvertent, in view of the fact that seamen for years have opposed exclusive coverage under workmen's compensation.
>
> "Because I think there is merit in their position, and because I feel they should not be deprived of bene-

fits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress, *I am proposing these amendments which are intended, insofar far as possible, to preserve the rights of federally employed seamen under existing law to proceed against the United States apart from the Compensation Act. The purpose is likewise to preserve the status quo as to choice of remedies by seamen.*

"The first amendment, therefore, proposes to add the following proviso to section 7 (b) of the Federal Employees' Compensation Act, which subsection would be inserted in that act by section 201 of the bill: 'Provided, however, *That this subsection shall not apply to a master or a member of the crew of any vessel.*'

"By this proviso, it is intended that the special provision, as added to the Compensation Act by this bill, declaring the liability of the United States under that act to be exclusive, shall not apply to seamen employed by the United States. It is not intended that the right of federally employed seamen, as heretofore recognized by the courts, to maintain suits against the United States, shall be lessened by this bill. In short, the amendment is intended merely to preserve the status quo as to seamen. If the Congress should decide to go into this matter further at some future session, it could then do so without delaying the enactment of this urgently needed bill.

"I propose further that a new section, section 305, be added to the bill on page 39, between lines 17 and 18, as follows:

"'Seamen

Sec. 305. (a) *Nothing contained in this act shall be construed to affect the exclusion of certain seamen (as defined in the Act of March 24, 1943, chapter 26, 57 Stat. 45, as amended; 50 U. S. C. Appendix, sec 1291)*

from the terms of the Federal Employees' Compensation Act, as provided by such act of March 24, 1943, as amended.

"'(b) *Nothing contained in this act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.*'"

. . . "Subsection (a) of the proposed section 305 is necessary because of the special status of seamen on vessels that were operated under the General Agency agreements with the War Shipping Administration, now succeeded by the Maritime Commission. By the so-called Clarification Act of March 24, 1943, as amended (50 U. S. C. Appendix, Sec. 1291), seamen on vessels so operated are excluded from coverage under the Federal Employees' Compensation Act, and it is not intended to supersede the Clarification Act by these amendments. While the House report on the bill (House Rept. No. 729, p. 13) states that it is not intended to repeal this specific statutory exclusion, doubts have been expressed as to whether the bill and the explanation in the House report would have the intended effect. Consequently, to resolve doubts on this score, subsection (a) of section 306 is proposed, in order to maintain the status quo under the Clarification Act.

"*Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomplished by the propsed amendment to section 201 of the bill, lest some other provision of the bill which, in some way not now foreseen, might be construed to take away any election of remedies that seamen might now have.* The new subsection would make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen whatever rights they now

have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compansation Act being made by this bill will be construed to negate or reduce any of the maritime rights and remedies of seamen."

To sum up, the 1949 Amendment to the Federal Employees Compensation Act demonstrates two things:

(a) that the Act in its original form was not an exclusive remedy with respect to any federal employees, and for that reason, it was necessary to enact the Amendment making the Act the sole and exclusive remedy;

(b) the Amendment recognized that federally employed seamen had, prior thereto, been entitled to the benefits of the Maritime Law, and the Amendment expressly excepted the seamen from the provision making the Compensation Act the exclusive remedy and preserved to those seamen all their Maritime rights.

The Decisions Overwhelmingly Support the View That Federally Employed Seamen Are Entitled to the Benefits Under the Suits in Admiralty Act Without Being Barred by the Compensation Act.

From the time of the adoption of the Suits in Admiralty Act in 1920, until 1946, numerous cases against the Government were brought by federally employed seamen without any objection from the Government. Thereafter, until 1951, the Courts uniformly held that the Compensation Act did not bar the seamen's actions under the Suits in Admiralty Act. The instant case and the *Johansen* case, both of which are now before this Court for review, are the first departure from the established rule.

During the first period referred to, it was apparent that the Government did not make any objection to the tort actions because of the clear and unambiguous language of the Suits in Admiralty Act. It may be assumed that the

Government was best aware of the legislative intent at the time the statute was enacted, and, had there been any doubt on this score, the Government would have asserted itself in those earlier cases covering the twenty-five year period, as it did in cases involving other federal employees. *Dahn v. Davis, supra,* for example, decided in 1922, demonstrates that the Government was alert to the defense that the Compensation Act might be a bar to a federal employee's tort action.

The fact that the Government failed to assert the same defense in the early stages after the passage of the Suits in Admiralty Act, and when the purpose of the legislation was most clearly in mind, leads to the conclusion that the Government well understood that the legislation was intended to include federally employed seamen as its intended beneficiaries.

The Supreme Court in *Brady v. Roosevelt SS Co., supra,* reached the same conclusion without any discussion of the Compensation Act. It is difficult to imagine that so fundamental an issue, which affected the very jurisdiction of the court, would have escaped the notice of the parties and the Court, if it were not for the fact that the legislation was well understood to create a tort action in favor of the seamen.

It was not until the case of *United States v. Marine,* 155 F. (2d) 456 decided in 1946, that the United States first advanced the contention that the Compensation Act was the exclusive remedy. In that case a customs inspector was injured on board a vessel owned and operated by the United States and he brought an action against the Government under the Suits in Admiralty Act. The United States defended on the ground that the Compensation Act provided the sole and exclusive remedy. The Court of Appeals for the Fourth Circuit in rejecting the Government's contention stated, (pp. 458-459):

> ". . . we have no manner of doubt from the plain words of the statute, considered in the light of the or-

dinary rules of statutory construction, that we are required to reach the same result. In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Employees' Compensation Act, *and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way.*" (Emphasis supplied.)

The Court then points out that the seaman is not barred from the remedy under the Suits in Admiralty Act unless he had made an election to accept the benefits under the Compensation Act, as follows (p. 459):

"What we have shown as to a lack of any reservation of immunity in the Suits in Admiralty Act, applicable in the circumstances of this case, impels the conclusion that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms. And in the same degree it is equally true that there is nothing in the Federal Employees Compensation Act which directly or indirectly would bar the right. The only applicability of the Compensation Act in a case like this occurs when the employee—as in the Brady case . . . has 'made an election' to avail of its benefits. Appellee, having elected to sue under the Suits in Admiralty Act, now has no claim under the Compensation Act . . . ."

In that case, the Government, in support of its contention, relied on three cases involving naval personnel where claims under the Public Vessels Act had been rejected specifically because of their status as military personnel. The Court of Appeals in the *Marine* case, distinguished those cases as follows (p. 460):

> "Nor do we think the Public Vessels Act affects the question. The decisions holding that an officer or enlisted man in the Navy may not avail of the Act in suits against a Government public vessel are placed largely upon the ground that *it would be contrary to the long standing policy of the United States with respect to the personnel of its Naval forces.* See Dobson v. United States, 2 Cir., 27 F. 2d 807; Bradey v. United States, 2 Cir., 151 F. 2d 742. *It is apparent that these cases are wholly inapplicable to the facts in the present case.*" (Italics added.)

The Ninth Circuit Court of Appeals reached the same conclusion in *United States v. Loyola,* 161 F. (2d) 126, decided in 1947. That case involved a claim by a federally employed seaman for maintenance and cure in connection with an illness which he suffered while in the service of a tugboat operated by the United States Army Transport Service. After reviewing all of the pertinent decisions, the Court held (p. 127):

> "Under the Suits in Admiralty Act of 1920, 46 U. S. C. A. Sec. 741 et seq., we have held that 'the United States in the operation of its merchant vessels' is liable for the relief of a seaman for his maintenance and cure. McInnis v. United States, 9 Cir., 152 F. 2d 387. In reaching the conclusion that the sovereign has here yielded its immunity for suit, we follow the decision of the Canadian Aviator case, 324 U. S. 215, 65 S. Ct. 643 that the broad language of the Public Vessels Act 'was deliberate and is not to be thwarted by

an unduly restrictive interpretation.' Our interpretation is also supported by the long established rule that legislation affecting a seaman's injuries and maintenance and cure is to be construed liberally in the seaman's favor. Jamison v. Encarnacion, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082; Aguilar v. Standard Oil Co., 318 U. S. 724, 729, 63 S. Ct. 930, 87 L. Ed. 1107; Cortes v. Baltimore Insular Line, 287 U. S. 367, 375, 53 S. Ct. 173, 87 L. Ed. 368."

Thus, prior to the Amendment of 1949, there was complete unanimity of decisions to the effect that federally employed seamen were entitled to benefits under the Suits in Admiralty Act and were not barred by the Compensation Act.

After the 1949 Amendment, despite the fact that it expressly reserved to federally employed seamen their maritime rights, the Government continued to advance the same contention as before, and the question was again tested in the Fourth Circuit in the case of *Johnson v. United States*, 186 F. (2d) 120. There, a federally employed seaman was engaged as a deckhand on a United States patrol boat and was injured while on duty, due to the negligence of a superior officer. Suit was brought under the provisions of the Public Vessels Act and the Government contended there, as here, that the injured seaman was limited to the provisions of the Compensation Act. In a very able and learned opinion by Circuit Judge Soper, the Court, after a careful analysis of the subject matter, again rejected the Government's contentions, stating (p. 123):

"We are impressed with the liberal construction accorded the Public Vessels Act in Canadian Aviator, Ltd. v. U. S., 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901, where the Supreme Court held that the right accorded to an injured party by the statute to recover damages caused by a public vessel of the United States should not, in frustration of the liberal intent of Con-

gress, be narrowly construed to restrict the recovery to damages caused by the physical instrumentality of the vessel but should also embrace damages caused by the negligence of its operators. Again in American Stevedores v. Porello, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, notwithstanding some uncertainty in the legislative history, the court held that the recoverable damages were not limited to damages to property but included damages to persons as well."

The Court then examined the legislative history and pointed out (pp. 123-124):

"We find nothing in this history to support the 'government's argument' but it is further said that Congress recognized that compensation is the only remedy open to seamen on public vessels by the passage of the War Shipping Administration (Clarification) Act of 1943, 50 U. S. C. A. Appendix Sec. 1291. That Act gave merchant seamen employed by the War Shipping Administration all the rights under law applicable to seamen on privately owned vessels and provided that they should not be considered as employees of the United States for the purposes of the Compensation Act; and further provided that the claims of such seamen should be enforced pursuant to the provisions of the Suits in Admiralty Act. It is contended that this statute was unnecessary if the right of seamen to sue under the Suits in Admiralty Act already existed. That right, however, had not then been adjudicated and it is a safe assumption that the Act was passed to make clear and beyond controversy that seamen on government merchant vessels, who were exposed to great risks during the war, should have the same privileges as seamen on privately owned ships, and would not be confined to the amount of damages fixed by the Compensation Act. The intention of Congress to exclude civilian seamen on government vessels from the broad terms

of the Public Vessels Act cannot be derived from this course of legislation."

The Court then considers the effect of the 1949 Amendment (p. 124):

"In 1949 Congress passed an amendment to the Federal Employees' Compensation Act for the obvious purpose of confining the liability of the United States for injury or death of an employee to the compensation provided by the Statute. See Sections 201 (b), 303 (g) and 305 (b) of the Act, approved October 14, 1949, Ch. 691, U. S. Cong. Serv., 81 Cong. 1st Sess. 866, et seq., 5 U. S. C. A. Secs. 757, 791-4. This enactment put an end to the option found to exist in the decision of this court in U. S. vs. Marine, supra. But Section 201 (b) was expressly limited during the progress of the bill through the Senate by a provision that it should not apply to a master or a member of the crew of any vessel; and in the debate on the floor the purpose of the limitation was stated to be to preserve the rights of seamen and to leave them in exactly the position in which they then were. 90 Cong. Rec. 13874-5. The Clarification Act had already provided that seamen employed by the War Shipping Administration should not be considered as employees of the United States for the purpose of the Compensation Act; but the Amendment of 1949 was not limited to such seamen but applied to the members of the crew of any vessel. See Militano v. U. S., 2 Cir., 156 F. 2d 599. This enactment is relevant to the present discussion, if at all, in that it indicates the same purpose disclosed in the earlier statutes to enlarge rather than restrict the rights of seamen to recover for personal injuries from the United States. The legislative history of the Public Vessels Act which is set out in Canadian Aviators Ltd., v. U. S., 324 U. S. 215, 218, 65 S. Ct. 639, 89 L. Ed. 901, and in American Stevedores v. Porello, 330 U. S. 446, 450, 67 S. Ct. 847,

91 L. Ed. 1011, discloses the same general purpose. In our opinion the government's position is not supported by the circumstances under which the foregoing statutes were enacted."

Thus, up to the very moment that the two decisions now before this Court were handed down, there was complete uniformity in the interpretation of the law. In the earlier cases for the first twenty-five years, after the enactment of the Suits in Admiralty Act, the Compensation Act was never raised as a bar to the enforcement of the seamen's maritime rights, and the parties and the Courts concluded from the clear terms of the legislation that these seamen were entitled to the benefit of the maritime laws under the Suits in Admiralty Act. The reasoning of the Courts in the later cases from 1946 to 1950 where the question was squarely raised, clearly sustains the interpretation adopted in the earlier decisions. The decisions in the *Johansen* case, and in the case at bar, are the first to depart from the established interpretation of the statutes. That departure appears to be grounded upon considerations which the lower Courts defined as matter of public policy.

Aside from the soundness or unsoundness of those considerations, it must be recognized that such considerations, where the Congressional intent is clear, are an invasion of the legislative functions. A review of the considerations relied upon by the Court below reveals that they are erroneous in substance, apart from the fact they are properly matters for the Congress rather than the judiciary.

The Compensation Act Does Not Provide a More Enlightened Form of Remedy Than That Under the Maritime Law.

The Court below adopted the view that compensation acts are generally "more humane, fair and adequate and a more enlightened form of remedy." This conclusion was drawn not as a result of an independent, comprehensive

study, but rather it was an assumption based on a commonly accepted but erroneous notion.

The system of Workmen's Compensation was brought into play because of the difficulty in establishing a claim for personal injuries under the old Common Law. Under that law, the employer was able to successfully resist the claims for personal injuries by means of the affirmative defenses such as the fellow servants rule, voluntary assumption of risk and contributory negligence.

Under the Workmen's Compensation system, an injury is compensable irrespective of negligence so long as it arises out of the employment. The system was also intended to dispense with litigation and afford the injured employee prompt payments without expense incident to litigation.

As the compensation system was put into effect and subjected to the test of experience, it became apparent that the compensation laws did not measure up to the panacea envisioned by the employees. In place of the old affirmative defenses, the employers now raised new defenses which served to defeat a very high proportion of the claims, and to reduce in amount an even greater percentage. Moreover, in those cases, where the employee was successful in obtaining an award, he found it completely insufficient to sustain himself or his family in his daily life, let alone to adequately compensate him for the injuries suffered.

Accordingly, the position of the employees and the employers changed completely. The employees, in recent years, have been seeking to escape from the system, while the employers have bent every effort to expand it.

The Railroad Brotherhoods have successfully resisted persistent attempts of the Railroads to extend the compensation acts into that field. The railway employees have found that the Common Law remedy, with some modification, provides an infinitely better and more equitable form of relief. By abolishing the affirmative defenses under the Common Law, these employees now enjoy a remedy which more nearly compensates them for the losses and injuries

suffered. While an occasional claim might be defeated, it is the exception rather than the rule. Taking into consideration the out-of-court settlements, along with court verdicts, the percentage of unpaid claims in this field is infinitesimally small when compared to the total number.

The seamen likewise have vigorously opposed being included within the compensation laws. This group of employees has the benefit of the original maritime law, and the Acts relating to railway employees, which have been incorporated into the Maritime Law by the Jones Act (46 U. S. C. 688). These remedies by far exceed the system of Workmen's Compensation as a practical, equitable and common sense remedy.

It is significant that the shipowners have, for many years past, been attempting to impose a system of compulsory compensation upon seamen and have from time to time caused Bills to be introduced into the Congress to effect that result. Congressional hearings upon those Bills were attended by representatives of all parties in interest. All of the seamen's unions, both A. F. of L. and C. I. O. representing licensed, as well as unlicensed personnel, appeared and testified in no uncertain terms that they did not want to surrender their rights under the Maritime Law for the benefits which might accrue under a compensation act. Congress, after a careful study of the problem, declined to enact a compensation law as substitute for the existing remedies.

Workmen's compensation acts are not a system of insurance and they do not provide a "sure" remedy, as has been represented by the proponents of that legislation. It did not take employers very long after the enactment of the compensation acts, to find defenses which have been just as effective as the old affirmative defenses under the Common Law.[2] Among these defenses, is the requirement that the injury "arise out of the employment." This

2 See Article by Samuel B. Horovitz, 3 NACCA Law Journal, "The Litigious Phrase: arising out of employment."

phrase has been characterized by the late Mr. Justice Murphy in *Cardillo v. Liberty Mutual,* 302 U. S. 469, as "deceptively simple and litigiously prolific".

The employers resist the compensation claims just as vigorously and as often as they did the personal injury claims. In a personal injury claim, once the employee obtains an award, he receives full payment for his injuries. In the compensation system, however, the employee's troubles are not over even after he obtains his award. For the employer regularly thereafter files periodic petitions to terminate or reduce the award. This means that the employee, in order to hold on to his award, meager though it be, must retain medical experts and counsel to resist the employer's efforts.

Professor Kenneth C. Davis, in an article in the Columbia Law Review, Vol. No. 6, stated that "the thousands upon thousands of reported cases on detailed questions of workmen's compensation law, are conclusive evidence of the expense and waste resulting from employer resistance of claims."

The contention that the compensation acts, therefore, reduce litigation and provide speedy compensation, without the aid of attorneys, is a most erroneous and unwarranted one. The very inadequate award which is granted to the employee in the first instance, is many times won only after a difficult battle, and the employee must be prepared to resist the constant thrusts of the employer to break down that award.

Frequently, the employee's financial inability to procure professional services, legal and medical, to offset those offered on behalf of the employer, adversely affect the claims.

As a direct consequence of the compensation acts, the standard of living of the injured employees and their families has been very sharply reduced and they frequently become burdens on the community, even where the employee

receives the full amount allowable under the compensation acts.

Contrast between the compensation system and that under the Maritime Law, conclusively demonstrates the fact that it is the Maritime Law and not the compensation acts, which provide the humane and enlightened form of remedy.

It may be useful to briefly examine the specific remedies under the respective systems. When a seaman is injured, or he falls ill in the service of the vessel, he becomes entitled, irrespective of any negligence or culpability, to maintenance and cure, in addition to his other remedies. This right alone exceeds anything that the compensation acts have to offer. He is entitled to maintenance when he is not confined in the hospital at a rate which has now been fixed at $8.00 per day, for the full period that he can be benefited by medical care and attention, in addition to the full cost of medical care. The right to maintenance and cure arises in any case where injury merely manifests itself while the seaman is in the service of the vessel. *Calmar v. Taylor*; 303 U. S. 527. Under the compensation system, the injury or illness must be caused by the employment. The basic philosophy underlying the maritime rights is thus far more humane and liberal, as well as more practical in its application than the Compensation Act.

But the maritime laws do not stop with maintenance and cure. If the injury or illness be due to the unseaworthiness of the vessel or its equipment, or to any negligence of the employer or his agents and employees, then the injured employee has a remedy for indemnity damages in addition to his right to maintenance and cure. This is, indeed, a truly enlightened form of remedy and one which might well serve as a pattern for general application.

In England, the compensation system, which has been in effect since 1897, has now been abolished and a broader scheme substituted in its place, in the form of "Law Reform (personal injuries) Act" 1948 (11 & 12 Geo. VI, c. 41).

The latter statute amended the British law and gives to the injured employee the right to recover damages in addition to the right to recover at least one-half of the benefits under the compensation laws. This type of legislation more nearly approaches the remedy now existing under the Maritime Law, and it is the best evidence to show that experience has proven the inadequacy of the compensation system and the efficacy of the Maritime Law.

To say, under these circumstances, that the existing compensation acts provide a more humane or enlightened remedy than that under the Maritime Law, is completely to ignore reality and the test of experience. Britain has found that the compensation acts have turned the clock back on progress and practical necessity. The English have, accordingly, restored the remedy which has been built up from the Common Law, to meet changing conditions and the ever growing needs of the community. That change now follows the draftsmanship of our own law as applicable to maritime employees. We would be extremely myopic if we failed to recognize the wholesome character of our maritime doctrines and abolished them in favor of a system which has utterly failed of its objective. If any change is made, it should be to enlarge the remedies presently enjoyed, and not to curtail them.

The Inclusion of Federally Employed Seamen Within the Public Vessels Act Does Not Discriminate Against Military Personnel.

The rationale of the contention of the Court below, is that military personnel cannot sue the Government for damages, on account of injuries sustained in the course of duty, and it would therefore be discriminating against these men if civilian seamen were permitted to recover damages for injuries sustained in the course of their employment. That reasoning is fundamentally unsound.

Congress has enacted, from time to time, special legislation to cover military personnel, of which only they may

have the benefit. These benefits include pensions, disability benefits, insurance provisions, educational and vocational training benefits, extraordinary medical benefits, preferences in civil service jobs, unemployment allowances and many others.

Congress did not extend these benefits to federally employed seamen. The latter enjoy entirely different benefits as already indicated. Once Congress has legislated, it is not within the province of the Judiciary to check into the fairness or unfairness of the legislation, or to determine whether the remedy in one case is proportionate to that in the other. By analogy to the reasoning of the Court below, a claim for overtime wages under the Fair Labor Standards Act might well be rejected because the military men fighting on the battle line are not entitled to overtime. Such a ruling would be obviously absurd, yet it would be the logical result of the reasoning of the Court below.

Congress has made provision for each group of personnel in a manner that it considered appropriate and its judgment is not open to judicial review.

It Is Not Contrary to the Public Interest to Include Federally Employed Seamen Within the Public Vessels Act.

The Court below reasoned that it is not in the public interest to have judicial review of questions of negligence in the conduct of military or semi-military operations. In reaching this conclusion, the Court assumed a hypothetical set of facts involving a military commander's judgment on the field of battle. In so doing, the Court failed to exercise the proper perspective and its approach to the problem was erroneous.

These cases do not involve a battle commander's judgment. When that situation arises, if ever, it will be time enough to meet it then as this Court said in *Brooks v. United States, supra.*

The liability in all these cases is predicated on the unseaworthiness of the vessel, or the negligence of a fellow servant in connection with the vessel's operations. In the instant case, which is itself an extreme one, the liability is based upon the action of the civilian Captain in negligently navigating the vessel into a known mine field. All of the information regarding that disaster has been officially approved for disclosure. There is no battle commander's judgment involved. It is simply a question of whether the Captain was negligent in navigating the vessel into a known mine field.

In the *Johansen* case, which is also before this Court on certiorari, the seaman based his claim for damages on the alleged negligence of a fellow employee in dropping a piece of timber upon him from above. In *Rodriguez v. U. S.*, 1951 A. M. C. 512, the seaman was injured while removing the guard from the blower of one of the boilers, through the negligence of the engineer on watch, *while the vessel was engaged in dredging the peaceful waters of the Delaware River*. The latter case represents the typical situation presented in most of these cases. In none of these cases is there involved a military commander's judgment on or related to the field of battle.

During the past war, the War Shipping Administration took over the operation of the entire merchant fleet and operated them under General Agency Agreements. The vessels were commanded and manned by merchant seamen. They were engaged in the transportation of men and material to all the various battle-fronts. They participated in the Normandy invasion. The Government concedes that the men who manned those vessels are entitled to the benefits of the Maritime Law without being affected by the Compensation Act. Congress was fully aware of all of the dangers inherent in all of these operations, and yet saw fit to safeguard the maritime rights of these men by special legislation.

The same seamen who manned the vessels for the War Shipping Administration were used interchangeably in the Army Transport Service. The nature of the service was the same in both. In principle, therefore, there was no reason to distinguish between seamen engaged by the Army Transport Service from those engaged by the War Shipping Administration.

Basically, it would appear that what really troubled the Court was the disclosure of information which might be of comfort to our enemies. This question is not and should not have been related to the question of whether the Public Vessels Act was the applicable remedy. That issue should have been directed at the second question in this case, namely, whether the Government's claim of privilege was correctly overruled. In connection with that issue it would have been appropriate for the Court to consider whether the national security was adversely affected or whether the disclosure of the information was otherwise contrary to the public interest.

It is of interest to note that the same type of objections were made in the case of *Brauner v. United States*, 192 F. (2d) 987, where the Government, as in the instant case, filed a claim of privilege and refused to produce certain documents in response to an order of Court. The Court of Appeals for the Third Circuit held that the Government's determination that the documents were privileged, was subject to judicial review with proper safeguards. That decision is hardly consistent in principle with the reasoning of the same Court in this case. But, however that may be, that issue is properly related to the Government's claim of privilege and it has nothing whatever to do with the interpretation of the legislation in question.

The Suits in Admiralty Act and the Public Vessels Act are couched in such clear and unambiguous language as to leave no doubt that they apply to federally employed seamen. No amount of tortured reasoning can read into the clear language of these Acts any qualification which would

make them subject to the Federal Employees' Compensation Act. The latter Act in its original form was never regarded as an exclusive remedy for any federal employees and particularly not for maritime employees. The 1949 Amendment was specifically drafted to make sure that the exclusivity provision, applicable generally to federal employees, *would not apply to federally employed seamen,* and that these employees would retain their maritime rights.

Congress has consistently refused to impose a compensation act on the seamen after a careful study of the problem and it enacted other legislation which it considered more appropriate. The effect of the decision of the Court below is to defeat the legislative intent and the legislative program relating to merchant seamen.

CONCLUSION.

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1951

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

The court below has held (191 F. 2d 164) that recovery may not be had under the Public Vessels Act for the death in the service of his ship of a civil-service employee, serving as a member of the civilian component of the crew of a public vessel of the Army Transport Service engaged in warlike operations in the presence of the enemy. In *Feres* v. *United States*, 340 U.S. 135, this Court held that recovery for service-incident death, injury, or ill-

ness of military-service employees may not be had under the Federal Tort Claims Act. The question of whether the same rule applies to recovery for similar service-incident death, injury, or illness of civil-service employees serving on public vessels remains open and has given rise to divergent views in the lower federal courts. In addition to the instant case, recovery has been denied by the Court of Appeals for the Second Circuit in *Johansen* v. *United States*, 191 F. 2d 162 (in which a petition for a writ of certiorari has been filed, No. 401, this Term). We regard these decisions as correct. The question has been decided in precisely the opposite manner, however, by the Court of Appeals for the Fourth Circuit in *Johnson* v. *United States*, 186 F. 2d 120; cf. *United States* v. *Marine*, 155 F. 2d 456.[1]

The question is of undoubted importance. Civil-service crew members employed on public vessels of the United States, unlike those on government

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[1] We do not regard *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9), as necessarily conflicting. There the Government argued successfully that, while the court had jurisdiction under the Public Vessels Act to determine the existence of a cause of action, the libelant had no cause of action for maintenance. Cf. *Feres*, *supra*, at pp. 140-141. The existence of a cause of action was precluded both because libelant had refused Government medical treatment and also because, although he forfeited compensation during such refusal, his fundamental right to compensation still precluded recovery. Since our contention that refusal of treatment precluded recovery was upheld, the court, correctly in our view, had no occasion to reach the question of whether libelant, although he had forfeited his compensation right, might nonetheless be precluded from recovery by his basic right to compensation.

merchant vessels operated by the Maritime Administration and its predecessors, the Shipping Board and the War Shipping Administration, are entitled to the benefits of the Federal Employees' Compensation Act for service-incident illness, injury, or death.[2] Such public vessel seamen, all but an insignificant number of whom are employed by the armed services as members of the civilian component of the crews of hospital ships, troop transports, and similar vessels, are not seamen in the ordinary sense of merchant seamen any more than are the members of the military component of the same crews. They are ordinary crew members of military vessels, frequently operating in the presence of the enemy, and are regular government employees entitled to all the benefits of the retirement, paid leave, disability, and death compensation statutes applicable to other members of the civil and military service. Public vessel seamen, if allowed both the right of

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[2] Merchant vessel seamen employed by the Maritime Commission and the Shipping Board were excluded from the benefits of the Federal Employees' Compensation Act under decisions of the Comptroller General founded on the view, ultimately upheld by this Court in *Johnson* v. *U. S. Fleet Corporation*, 280 U.S. 320, that merchant seamen employed by the United States have their exclusive recovery against the United States for illness, injury, or death under the Suits in Admiralty Act. See cases collected in *Gibbs* v. *United States*, 94 F. Supp. 586, 589, fn. 9 (N. D. Calif.) and referred to in the lower court opinion (fn. 15, 191 F. 2d at 168). Merchant vessel seamen of the War Shipping Administration and the present National Shipping Authority have the same status by reason of the Clarification Act (57 Stat. 45; 50 U.S.C. App. 1291(a)).

recovery by suit, which is given government-employed merchant seamen, and the right to compensation benefits, which is given regular military and civil-service employees of the Government, would enjoy a privileged position far superior not only to military-service employees but also to merchant seamen, both government and private alike, who have only the right of suit but enjoy no right to compensation. Equally important, as pointed out by the court below (191 F. 2d at 167), is the security aspect of permitting recovery by suit for service-incident injuries of public vessel seamen of the armed services.

While we thus regard the decision of the court below as correct, we believe that the conflict among the circuits and the importance of the question call for an authoritative decision by this Court. We therefore do not oppose the granting of the petition.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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[3] Nor, as stated in a separate memorandum being submitted simultaneously herewith, do we oppose the granting of the petition in the *Johansen* case, No. 401, this Term.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 414.

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE DILLEHAY, JR., Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION OF SAMUEL MANDEL, ADMINISTRATOR, FOR RE-HEARING

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 414.

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF SAMUEL MANDEL, ADMINISTRATOR, FOR RE-HEARING.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Samuel Mandel, as Administrator of the Estate of Robert Willie Dillehay, Jr., deceased, petitioner in the above entitled cause for a rehearing and reconsideration of the decision rendered by your Honorable Court on May 26, 1952, respectfully represents:

1. The basic issue in this case was whether or not the Compensation Act provided the exclusive remedy for public vessel seamen. This Court conceded that the literal language of the statutes supported petitioner's claim under the maritime law and that the legislative history was not inconsistent with that view. Notwithstanding that, however, this Court concluded that since federally employed seamen on government merchant vessels did not have an election to choose between the Compensation Act and the

maritime remedies, it would be unfair to give the federally employed seamen on public vessels such an election. The logical conclusion from this reasoning would be to take away the right of election from the public vessel seamen and place them on the same footing with the other government employed seamen. And this construction would be the natural consequence of the literal language of the statutes. However, your Honorable Court failed to follow its reasoning to its logical conclusion, but instead, concluded that since the public vessel seamen should not have an election of remedies the Compensation Act must be the exclusive remedy. This conclusion is not only a non sequitur but it throws the entire system of law into a state of chaos. The finding that public vessel seamen are not entitled to an election of remedies does not even remotely imply that the Compensation Act is exclusive. It simply means that these seamen do not have a choice of remedies. If the basis for the Court's decision has any relevancy at all it would require the opposite result than that found by the Court. It was in fairness to Federally employed merchant seamen that the Court concluded there is no right to an election. If this means anything at all it means that public vessel seamen should be given the same rights as the other government seamen, no more, no less. Anything different would be unfair to one group or the other and since this Court adopted the standard of fairness as the test, the remedies of both groups should be equalized in order to conform to that test. The conclusion which this Court reached fails utterly to conform with the formula which it prescribed.

Had the Court correctly applied its own formula and made the remedies the same, in the interest of fairness, that result would have been entirely consistent with and the natural result of the clear language of the statutes in question. As the matter now stands, the statutes are emasculated by an unnatural and incompatible construction, in addition to the unfairness resulting to the public vessel seamen.

The public vessel seamen are drawn from the same pool as are other government seamen. Their work is the same and working conditions are identical. When they are drawn from the pool and assigned to work they are totally unaware of whether the government vessel to which they are attached is a public vessel or a merchant vessel. In fact, there has not been any authoritative expression to determine what is a public vessel and which is merchant. In any event, the personnel who man both are from the same source and are subject to the same working conditions in both cases. There is therefore every reason to make their remedies consistent. Since this Court has stated that considerations of fairness preclude the public vessel seamen from exercising a choice of remedies because other government seamen are limited to the maritime remedies, the same considerations of fairness should afford the maritime remedies to the public vessel seamen.

2. The other reason relied on by this Court in support of its conclusion that the Compensation Act is the exclusive remedy for public vessel seamen, is that this construction of the statutes would make a "workable, consistent and equitable whole", citing *Feres v. United States*, 340 U. S. 135. The conclusion of the Court in this case is directly in conflict with the principle. The *Feres* case involves a member of the armed forces, and it was held that the claimant there should be afforded the same remedies which are available to other military personnel. Those personnel are not governed by the Compensation Act for Federal employees. Congress has enacted special provisions such as disability benefits, pensions, insurance and other benefits. These enactments apply to all military personnel and they may not be impaired by the Compensation Act. It was the uniform application of these benefits for injuries and disabilities to all military personnel, which this Court held in the *Feres* case "to make a workable, consistent and equitable whole." A fortiori, all civilian seamen should be accorded the same uniform remedies re-

gardless of what branch of the Government happens to employ them. In the last war the ships which were operated by the War Shipping Administration performed exactly the same services as those operated by the Army Transport Service. They sailed in the same convoys and were used interchangeably in one service or another. The civilian seamen who manned those vessels, as has already been indicated, all came from the pool maintained by the War Shipping Administration and they were assigned to all government vessels by that agency. There is no valid reason why these men should be governed by different laws. If the test of workability, consistency and equity be applied then clearly these men should be governed by the same rules.

Under the decision of this Court the entire system is thrown into an unworkable, inconsistent and inequitable state. Civilian seamen employed on vessels operated by the National Shipping Authority are governed by the maritime law, while seamen employed on vessels operated by some other governmental agency are limited to the remedy under the Compensation Act and are precluded from the maritime remedies. This segment of the seamen would thus be governed by the laws applicable to employees on land whose problems and working conditions are entirely different. It is not only an impractical arrangement but it is completely lacking in consistency and it is most inequitable to the public vessel seamen who are deprived of the maritime benefits.

This Court was thus clearly mistaken in holding that the Compensation Act must be construed to be exclusive in order to effect a workable, consistent and equitable whole. That construction accomplishes exactly the opposite result. From this aspect, if the statutes involved are interpreted in their literal and normal manner the desired objective is achieved, since there will be complete uniformity of remedy among all government seamen and this will indeed make for a workable, consistent and equitable whole.

3. This Court concedes that the Shipping Act of 1916 and the Suits in Admiralty Act of 1920, gave a right of action under the maritime law to federally employed seamen against the government. This presupposes that the Compensation Act was not exclusive as to these seamen. The Public Vessels' Act came along in 1925 and it incorporated into it the Suits in Admiralty Act. The necessary conclusion is that the Public Vessels' Act has the same scope as the Suits in Admiralty Act and this interpretation attached to the Act from its inception.

After the outbreak of World War II the Government requisitioned and operated practically all vessels, and the crews became federal employees. It must also be noted that all seamen were recruited through the War Shipping Administration. That agency maintained a pool of seamen and furnished the crews for all vessels including public vessels as well as merchant vessels. The crews for Army Transport vessels were likewise engaged through the War Shipping Administration.

Because it was anticipated that, as federal employees, this group of seamen might become entitled to the benefits of the Civil Service Retirement Act, the United States Employees' Compensation Act, and other legislation applicable to federal employees, and because it was recognized that these seamen were already adequately provided for under the maritime law, the Congress enacted the *Clarification* Act to *clarify* the status of these seamen and avoid an overlapping of remedies. The Clarification Act therefore was designed to prevent an election of remedies and to restrict these seamen to the enjoyment of their maritime rights. This Act covered virtually all federally employed seamen on public as well as merchant vessels since they were all engaged through the War Shipping Administration.

This was a clear manifestation of congressional intent to make a consistent, workable and equitable remedy for all federally employed seamen, without regard to the nature of the vessels to which they were assigned and upon

which they served. That Act demonstrated further the intent to preserve the maritime rights to the seamen and to prevent the exercise of any election to forego those rights and seek the remedies generally accorded to non-maritime employees of the government. The Clarification Act did not create any new rights or obligations. It simply "clarified" the existing rights and obligations.

The decision of this Court would place certain seamen engaged on public vessels, who were not engaged through the War Shipping Administration, in a category separate than that of other public vessel seamen and that of the remaining federally employed seamen. The reasoning behind this decision is fallacious and fails to withstand analysis. This Court said that because federally employed seamen engaged by the War Shipping Administration do not have an election between the maritime remedies and the Compensation Act, then public vessel seamen who are not engaged through the War Shipping Administration are limited to the remedy under the Compensation Act. The logical conclusion would have been to limit the latter public vessel seamen to the same remedies applicable to the other federally employed, including public vessel, seamen. This conclusion conforms with the standard set up by this Court for the determination of the problem. First it makes for a workable, consistent and equitable whole, since it applies uniformly and fairly to the entire group of employees within the category, and because it does not give any one segment of the group an unfair advantage over the other.

Equally important is the fact that in this view, the Compensation and Public Vessels' Acts may be read in the ordinary normal fashion and not in disregard of the plain literal language of those statutes.

The decision under consideration transcends the cases now before this Court. Hundreds of cases where verdicts have already been rendered will be nullified and in countless future cases valuable rights will be lost where the Congress fully intended the maritime remedies to provide an

adequate recovery. We earnestly submit that the further consideration by this Court is peculiarly merited in view of the fact that the pertinent principles have not been fully explored.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

I hereby certify that the within petition is filed in good faith and not for purpose of delay.

ABRAHAM E. FREEDMAN.

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In the Supreme Court

of the United States

OCTOBER TERM, 1951 — No. 414

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE, DILLEHAY, JR., Deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE, and BRIEF AMICUS CURIAE.

B. A. GREEN,
1003 Corbett Building,
Portland, Oregon,
Amicus Curiae.

5-52

STEVENS-NESS LAW PUB. CO.

In the Supreme Court

of the United States

OCTOBER TERM, 1951 — No. 414

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE, DILLEHAY, JR., Deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes now *B. A. Green,* an attorney duly admitted to practice before this honorable court, and respectfully petitions this honorable court for leave to file the accompanying Brief Amicus Curiae in support of plaintiff's Petition for rehearing.

Your petitioner is, and for many years has been, counsel for numerous labor organizations in the State of Oregon, including the Oregon State Federation of Labor, the Marine Engineers Beneficial Association, Local No. 41, Portland, Oregon, affiliated with the National Marine Engineers Beneficial Association, the National Organization of Masters, Mates & Pilots, Local No. 17, Portland, Oregon, the Inlandboatment's Union of the Pacific, Columbia River Division, Portland, Oregon, and the Portland branch of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association; that said labor organizations are composed of many members and include many members employed in the maritime industry; that said members are, from time to time, employed by the United States of America on public vessels owned and operated by the Government; that said labor organizations are, therefore, vitally interested in the issues involved in this cause and therefore your petitioner seeks leave to file a brief amicus curiae in support of the position taken by counsel for the plaintiff herein.

That your petitioner has been notified by counsel for the plaintiff in this cause that a petition for rehearing will be filed with this honorable court; that Abraham E. Freedman, counsel for the plaintiff in this cause, has consented to the filing of a brief amicus curiae but time does not permit the obtaining of counsel's written consent to attach to this Petition; that your petitioner is informed and believes and therefore alleges that other counsel proposing to file briefs amicus curiae in this

cause have attempted to obtain the consent to filing amicus curiae briefs from Leavenworth Colby, counsel for the United States of America, and that such consent has been refused; that time does not permit your petitioner's obtaining said counsel's written consent or written refusal of consent to the filing of such brief.

That your petitioner has read the original brief filed by counsel for plaintiff in this cause and your petitioner concurs in and endorses the arguments and reasons therein set forth in support of plaintiff's position.

That your petitioner has read the majority and dissenting opinions of this court in this cause, which opinions were announced on May 26, 1952; that your petitioner respectfully submits that the result reached in the majority opinion is contrary to and in conflict with long established legal principles and is contrary to the purpose and intent of the federal legislation involved, to-wit, the Federal Employees Compensation Act, 5 U.S.C., Sec. 751 et seq., and the Public Vessels Act of 1925, 46 U.S.C., Sec. 781 et seq.; that under said majority opinion the rights of many persons employed in the maritime industry on public vessels owned and operated by the United States of America are prejudiced and that, therefore, the labor organizations hereinabove referred to and whom your petitioner represents, are interested in obtaining a reconsideration of the issues involved in this caused by this honorable court.

That this Petition is filed in good faith and not for the purpose of delay and, in my opinion, is well founded in law and fact.

WHEREFORE, your petitioner respectfully petitions this honorable court for leave to file the accompanying Brief Amicus Curiae, that petitioner's Petition for Rehearing be allowed, and that the judgment of this court announced May 26, 1952, be reversed.

B. A. Green
Petitioner

STATE OF OREGON)
) ss.
County of Multnomah)

I, *B. A. Green,* being first duly sworn, depose and say: that I am the petitioner in the foregoing Petition; that I have read the same, know the contents thereof, and that the same is true, as I verily believe.

B. A. Green

Subscribed and sworn to before me, a notary public, on this, the 5th day of June, 1952.

Donald S. Richardson
Notary Public for Oregon
My commission expires May 31, 1954

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In the Supreme Court

of the United States

OCTOBER TERM, 1951 — No. 414

SAMUEL MANDEL, Administrator of the Estate of ROBERT WILLIE, DILLEHAY, JR., Deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

As stated in the petition for leave to file this brief, the undersigned attorney is counsel for numerous labor organizations in the state of Oregon, including the Oregon State Federation of Labor, the Marine Engineers Beneficial Association, Local No. 41, Portland, Oregon, affiliated with the National Marine Engineers Beneficial Association, the National Organization of Masters, Mates and Pilots, Local No. 17, Portland, Oregon, the Inlandboatmen's Union of the Pacific, Columbia River

Division, Portland, Oregon, and the Portland branch of the Pacific Coast Marine Firemen, Oilers, Wipers and Watertenders Association. These organizations include many members who are employed in the maritime industry in interstate and foreign commerce. As is well known, the nature of such maritime employment is such that at times such employees are employed by private shipping concerns and at other times by the Government of the United States, as was the plaintiff's decedent in this cause.

While the various labor organizations representing maritime employees do not have collective bargaining agreements with the United States Government, wages, hours and working conditions observed by the Government of the United States as such an employer tend to follow the trend of such conditions achieved by the labor organizations and incorporated in collective bargaining agreements with private maritime employers. Also, it is obvious that these labor organizations have a vital interest in the protection and preservation of the rights of their members and others who are on occasions employed by the United States in capacities similar to that of the plaintiff's decedent herein.

Under the majority opinion in this case, such employees are deprived of a vital right which had heretofore been accorded to them and which had been recognized by many courts. That is the right to prosecute suits for damages for injuries or death under the Public Vessels Act, 46 U.S.C., sec. 781. We submit that this deprivation is contrary to well established principles of

law, and also directly contrary to the intent of Congress, as expressed in the 1949 amendments to the Federal Employees' Compensation Act and, therefore, that plaintiff's petition for rehearing herein should be allowed and the present judgment of this court should be reversed.

ARGUMENT

I.

Prior to 1949, federal employees were not limited to compensation under the Federal Employees' Compensation Act, but their rights under such Act were elective only.

Brooks v. United States, 337 U.S. 49, 93 L. Ed. 1200.
Johnson v. United States, 186 F. 2d 120.
Gibbs v. United States, 94 F. Supp. 586.
Panama R. Co. v. Minnix, 282 F. 47.
Panama R. Co. v. Strobel, 282 F. 582.
Payne v. Cohlmeyer, 275 F. 803.
Marine v. United States, 65 F. Supp. 111, affirmed 155 F. 2d 456.
White v. United States, 77 F. Supp. 316.

This court, in *Brooks v. United States*, supra, recognized that an election of remedies was permitted under the Federal Employees' Compensation Act. At 93 L. Ed. 1204 the court stated:

> "Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, (citations)."

In the other cases above cited, the federal courts there held that federal employees have the right of elec-

tion either to accept compensation or to sue the Government or the appropriate governmental agency under various statutes, wherein governmental immunity had been waived by Congress. In the instant case governmental immunity was waived by Congress by the enactment of the Public Vessels Act of 1925. Therefore, under existing case law prior to the instant decision, federal employees and their counsel were warranted in assuming that the right of election existed.

II.

The 1949 amendments to the Federal Employees' Compensation Act did not make compensation the exclusive remedy for seamen employed by the Government, and this court should not construe the remedy as exclusive when Congress has not done so.

95 Cong. Rec. 13608.
Brooks v. United States, supra.

It is apparent that the 1949 amendments to the Federal Employees' Compensation Act made compensation the exclusive remedy for federal employees other than seamen. However, the pertinent amendment includes the following provision:

> " . . . provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel." 5 U.S.C. sec. 757 (b).

This proviso is found at the end of the subparagraph which did make compensation the exclusive remedy for other federal employees. The present majority opinion in this cause entirely vitiates the effect of this reserva-

tion made by Congress and renders the proviso entirely meaningless. It is, of course, not to be assumed that Congress intended to perform a futile act by including the reservation with respect to seamen. Also, an examination of the legislative history surrounding the amendments reveals that the intent of Congress was to preserve the seamen's right of election. The reservation amendments were proposed by Senator Morse, of Oregon, and in presenting the modification Senator Morse stated:

> "Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and the Public Vessels Act. . . . I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress . . ." 95 Cong. Rec. 13608.

The modification was agreed to by Senator Douglas, the senator in charge of the bill. 95 Cong. Rec. 13609. We submit that the foregoing establishes a clear recognition by Congress that seamen had the right of election and the congressional intent to preserve that right.

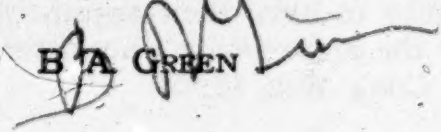
Inasmuch as Congress did not express an intent to make compensation the exclusive remedy for seamen but, on the contrary, expressed its intent to preserve the election right, the court certainly should not judicially declare that the compensation remedy is exclusive. As stated by this court in *Brooks v. United States*, supra, at 93 L. Ed. 1204:

"We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

CONCLUSION

In conclusion, we submit that in order to preserve in effect established rights of seamen under earlier federal court decisions, and in order to give effect tc the announced intention of the Congress of the United States, as expressed in the 1949 amendments to the Federal Employees' Compensation Act, plaintiff's petition for rehearing should be allowed and the present judgment of this court should be reversed.

Respectfully submitted,



B. A. GREEN

STATE OF OREGON,)
) ss.
County of Multnomah,)

I, B. A. Green, being first duly sworn, depose and say:

That I served the within petition for leave to file amicus curiae brief and amicus curiae brief upon Abraham E. Freedman, counsel for plaintiff, and Leavenworth Colby, United States Attorney in charge of admiralty, of attorneys for the defendant, by depositing in the United States Postoffice at Portland, Oregon, on the 6th day of June, 1952, a full, true and correct copy thereof, addressed to the said Abraham E. Freedman, Attorney at Law, 1415 Walnut Street, Philadelphia, Pennsylvania, and to the said Leavenworth Colby, United States Attorney, Attorney General's Office, Washington, D. C., and prepaying the postage thereon.

B. A. GREEN

Subscribed and sworn to before me this 6th day of June, 1952.

DONALD S. RICHARDSON
Notary Public for Oregon
My commission expires May 31, 1954

MOTION FILED JUN 10 1952

In the Supreme Court of the United States

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No. 414.

OCTOBER TERM, 1951.

SAMUEL MANDEL,
Administrator of the Estate of
ROBERT WILLIE DILLEHAY, JR., Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION OF SEAFARER'S INTERNATIONAL UNION (GREAT LAKES DIVISION) AS AMICUS CURIAE.

S. ELDRIDGE SAMPLINER,
Caxton Bldg., Cleveland, Ohio,
Attorney for Seafarer's International Union.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5547

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OCTOBER TERM, 1951.

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UNITED STATES OF AMERICA.

PETITION OF SEAFARER'S INTERNATIONAL UNION (GREAT LAKES DIVISION) AS AMICUS CURIAE.

To the Honorable the Justices of the Supreme Court of the United States:

The filing of this amicus curiae brief is provided for by Paragraph 9 of Rule 27 of this Court.

The Seafarer's International Union on the Great Lakes by their Attorney, S. Eldridge Sampliner, prays your Honorable Court for leave to file a Brief in support of a petition for a rehearing in the above entitled matter.

The Seafarer's International Union on the Great Lakes has a keen interest in the instant case because of its concern for the safety of seamen in general by increasing the safety standards and operations of seagoing vessels and further seeing that the laws which have always protected the seamen remain in full force and effect with proper interpretation being given to them.

The United States Court of Appeals of the Third Circuit held that the Administrator of the Estate of the civilian crew member, who was killed by serving as an officer of a tug which was owned and operated by the United States, which tug was struck by a mine in an Italian Port in 1944, could not sue the United States Government under the Public Vessels Act or the Suits in Admiralty Act to recover damages because of careless navigation of the tug, but was required to accept as sole compensation an award under the Federal Employees Compensation Act.

The Supreme Court of the United States on May 26, 1952, rendered a decision in behalf of the United States and against the Petitioner in the above-entitled matter, thus affirming the decision of the United States Court of Appeals for the Third Circuit.

QUESTION PRESENTED.

Whether the United States Court of Appeals for the Third Circuit and the United States Supreme Court correctly found that the Federal Employees Compensation Act was the exclusive remedy available to a civilian seaman killed on board a United States Public Vessel.

STATUTES AND REGULATIONS INVOLVED.

Federal Employees Compensation Act Sec. 1 *et seq.*, as amended, 5 U. S. C. A. Sec. 751 *et seq.*; Public Vessels Act, Sec. 1 *et seq.*, 46 U. S. C. A. Sec. 781 *et seq.*; Suits in Admiralty Act, 46 U. S. C. A., Sec. 741, *et seq.*

STATEMENT.

The pertinent facts may be summarized as follows:

The District Court entered judgment in favor of the libelant and against the United States because of the latter's refusal to produce a given document or record. The United States then appealed the case to the Court of Appeals for the Third Circuit, and while the main issue involved in the District Court was whether the Secretary of the Army was correct in refusing to release information which he regarded as important to keep secret, the Court of Appeals ruled on the broader question of whether the United States is liable to a suit at all.

ARGUMENT.

The first reason given by the Court of Appeals for reversing the District Court's decision is that the Workmen's Compensation Acts of the various states have been held to be the exclusive remedy available unless the Act is by its terms optional.

1. This is not a fair analogy. The purpose of these acts is to shift the burden of accidental injuries from the workmen to the industry, and to treat the cost of personal injuries incidental to employment as part of the cost of the business "and with a view that the expense of industrial accidents be ultimately paid by the consumers of the products of the industry and thus provide protection for both employer and employee." *Schneider, Workmen's Compensation Law*, Sec. 3 (1941). Therefore, the State Legislation is aimed at protecting both the employer and the employee whereas the Federal Legislation involved in the Federal Employees Compensation Act would be more analogous to a liberal grant by the United States Govern-

ment, and any construction of said Statute in favor of the recipient of said grant would not affect any third party involved. Thereby an interpretation of State Workmen's Compensation Acts, that would allow the employee to have an additional remedy other than that provided by the Act would be unfair to the employer and it would not be in harmony with the initial intention for the protection of both employer and employee.

Also many of these State Workmen's Compensation Acts expressly provide that the remedy provided by the Act is exclusive whereas in the Federal Employees Compensation Act there is no mention of that legislation being the exclusive remedy to seamen.

2. Allowing a civilian seaman to maintain an action under the Public Vessels Act and under the Suits in Admiralty Act would not discriminate against members of the Armed Forces any more than to bring to light the fact that members of the Armed Forces in many instances are subject to much different rules and regulations than civilians. In the case of *Feres*, 340 U. S. 135 decided by this Court in December 1950, this Court recognized that even soldiers may be subject to different remedies. The Honorable Justice Jackson, delivering the opinion of the Court, rationalized the decision in the *Brooks vs. United States*, 337 U. S. 49 case by stating that Brooks' relationship while on leave was not analogous to that of a soldier while performing duties under orders, thus leaving the inference that a soldier, depending on the circumstances under which he was injured, may bring suit under the Federal Tort Claims Act. Therefore, even a soldier in some instances has different remedies available to him.

3. The Court's fear, that a judicial review of the question of negligence in the type of suit in question would not

be in the public interest, might well be correct, but this issue should not be involved in the Court's determination of whether or not Congress intended that the Federal Employees Compensation Act be an exclusive remedy. This fear should be eliminated by proper legislation by Congress, and not by reading into a Statute the evils of a natural interpretation of said Statute. There is ample legislation on the books to prevent the disclosure of any information that might jeopardize the safety of this country without using this reasoning to restrict the proper function of the Public Vessels Act.

4. The Federal Employees Compensation Act, C 458, Sec. 1, 39 Stat. 742 provides that the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duties.

This Act was the expression of a slowly developed purpose on the part of the United States Government to give compensation to its employees who otherwise would be without remedy when injured by fault of the Government. It is essentially an act of justice and grace on the part of the United States Government. *Dahn vs. Davis*, 258 U. S. 421. Therefore the intent of Congress is one of generosity rather than restriction on remedies for injured employees.

The remedy given to an employee of the United States under the Federal Employees Compensation Act is not exclusive and he may at his election maintain a personal injury action. *Payne vs. Cohlneyer* (CCA Ill. 1921), 275 F. 803.

The Public Vessels Act should be liberally construed so as to authorize recovery and damage for death resulting from collision caused by United States vessel. *New England Maritime Co. vs. United States*, 55 Fed. 2d 674.

Congressional adoption of broad statutory language authorizing suits against the United States for damages caused by a Public Vessel of the United States is not to be thwarted by any unduly restricted interpretation. *Canadian Aviator, Ltd. vs. United States*, 324 U. S. 215.

The Public Vehicles Act permits assertion of liability in Admiralty against United States, not only where vessel itself is the offending thing that has physically caused damage, but also where the crew of public vessel has been negligent. *Roah Hook Brick Co. vs. Erie RR. Co.*, 64 F. Supp. 288.

The above cases seem to bear out the intent of Congress in granting these new rights under the Public Vessels Act. The very recent case of *Johnson vs. U. S.*, 186 Fed. 2d 120 held that a civilian seaman on a Public Vessel of the United States was entitled to recover under the Public Vessels Act for injuries resulting from negligence of the operator of the ship, notwithstanding that he was entitled to compensation under the Federal Employees Compensation Act.

We are impressed with the liberal construction accorded the Public Vessels Act in *Canadian Aviator, Ltd. vs. United States*, 324 U. S. 215 where the Supreme Court held that the right accorded an injured party by the Statute to recover damages caused by a Public Vessel of the United States should not in frustration of the liberal intent of Congress be narrowly construed to restrict the recovery to damages caused by the physical instrumentality of the vessel but should also embrace damages caused by the negligence of its operators. The Federal Employees Compensation Act was passed in 1916 before the Statutes which now permit suits against the United States for Maritime Torts and for Torts in general. It was devoid of these provisions usually found in compensation

statutes that the benefits conferred upon the employee are exclusive of any other recovery against the employer.

Even under the Long Shoremen's & Harbor Workers Compensation Act, the Court has recognized that it is not an exclusive remedy. *Raderu vs. Jorka Corp.*, 26 F. Supp. 304.

> "Prior to the Longshoremen's Compensation Act, a longshoreman had a possible right of action against the vessel on which he was injured, against his immediate employer or against anyone also claimed to be responsible for injuring him, and the change in the law was not intended to reduce his rights but to enlarge them."

Thus in conclusion may we humbly state that this Honorable Court, not being able to find any possible reasoning that would restrict a seaman's suit under the Public Vessels Act itself, or any of a long line of decisions under the Act, came forth with another Statute enacted in 1916; known as the Federal Employees Compensation Act, and reasoned thusly: (1) the Federal Employees Compensation Act is an exclusive remedy, (2) a seaman is entitled to the benefits of this Act, (3) therefore, the Federal Employees Compensation Act is a seaman's exclusive remedy when injured on a Public Vessel. This line of reasoning is erroneous in that even Congress in 1949 refused to make the Federal Employees Compensation Act an exclusive remedy for seamen. Therefore the conclusions from this false premise are incorrect.

The Court's explanations of why they are now depriving a seaman of the rights he has had for many years cannot end by the above-enumerated reasoning, for they then had to explain another piece of legislation designated as the Public Vessels Act, and this they completely side stepped by reverting back to their false interpretation of

the Federal Employees Compensation Act. Their reasoning forms somewhat of a circle with an act of injustice as an end result.

If the Court is to deprive seamen of benefits they have received for many years when Congress would not do so in 1949, then the Court is not acting in its judicial capacity but rather as a legislative body, and the framers of our Constitution never intended this to be.

WHEREFORE it is respectfully urged that this Court grant a rehearing in the above-entitled matter and that the Seafarer's International Union's Attorneys be granted the privilege of filing this Brief as amicus curiae.

Respectfully submitted,

S. ELDRIDGE SAMPLINER,

Attorney for Seafarer's International Union.

FILED
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Supreme Court of the United States.

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OCTOBER TERM, 1951.

No. 414

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIS DILLARD, JR., DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION OF NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS AS AMICUS CURIAE.

SAMUEL B. HOROVITZ,
Attorney for Petitioner for Rehearing.

Supreme Court of the United States.

OCTOBER TERM, 1951.

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION OF NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS AS AMICUS CURIAE.

To the Honorable the Justices of the Supreme Court of the United States:

The National Association of Claimants' Compensation Attorneys prays your Honorable Court for leave to file a brief in support of a petition for a rehearing in the above-entitled matter upon the following considerations:

The National Association of Claimants' Compensation Attorneys is an organization which is limited to attorneys engaged in helping injured workers in the fields of workmen's compensation, negligence, railroad law and admiralty law.

When the National Association of Claimants' Compensation Attorneys (NACCA) was organized it was intended to be limited only to attorneys engaged in the field of workmen's compensation. After a period of time the compensation attorneys recognized the inadequacy of the com-

pensation laws generally and the necessity for some other form of law which would more equitably and adequately compensate the injured workers and their families in case of death. It was therefore natural for the association to expand its membership to include the fields of negligence, railroad law and admiralty law.

The decision of this Court in the above-captioned cases is of such tremendous importance to employees generally and to federally employed seamen in particular that NACCA, consistently with its policy to aid injured workers, hereby seeks to intervene in order to prevent what would appear to be a serious inroad into existing remedies which would impair the seamen's maritime rights and which will create a precedent, to the great prejudice of employees generally and maritime employees specifically. The decision in these cases would divide the class of seamen and provide an inadequate land remedy (compensation) for part of the class while the remainder would continue to enjoy the present maritime rights. This is an objective which has been sought after by the private steamship companies for a great many years but which has been consistently denied by the Congress after a study of the subject matter. Because of this lack of uniformity, the private shipowner is in a position to seek further extension of the compensation acts in order to make the remedy uniform as to all seamen. With this background, it is respectfully suggested that this Court should re-evaluate its decision to determine its correctness.

From the time the Public Vessels' Act was enacted in 1925, all interested parties proceeded on the assumption that its provisions extended to the benefit of federally employed seamen as well as other personnel. Hundreds upon hundreds of suits were instituted and decided upon that assumption without any objection being ventured as to the federally employed seamen's rights to bring an action

against the Government under that statute. The Government's acquiescence is manifested in its failure to assert such objection to those suits. It therefore seems apparent that the Government and the litigants recognized the intention of Congress to afford a remedy to federally employed seamen under the Public Vessels' Act. It was not until comparatively recent times that the Government introduced the new theory that federally employed seamen were limited to the Compensation Act. This construction was never contemplated by the Congress.

It would appear that this Court's approach to the problem was confused by the failure to put its finger on the real issue in the case. Your Honorable Court considered the problem from the standpoint of whether the seamen have an election to choose the compensation remedy or the maritime rights. Actually, the question was not one of election but whether the Compensation Act is exclusive. The seamen may well have been limited to the maritime rights without any election, and this fact would not be at all dependent upon the exclusiveness of the compensation law. The literal language of the statutes would support such a conclusion. The Court held that it would be unfair to permit an election to public vessel seamen and not to other federally employed seamen. Without debating that question of fairness and assuming its correctness, that fact does not lead to the conclusion that the Compensation Act is exclusive. It merely would determine that the seamen should not be permitted an election of remedies and to that extent put them on a par with other federally employed seamen. By thus taking away from the seaman the right of election, he is left, under the literal language of the Compensation Act and of the Public Vessels Act, to the enjoyment of his maritime rights, to the exclusion of any right under the Compensation Act. In this view, the seamen are given no greater and no lesser rights than the seamen

employed through the War Shipping Administration. This would clearly make for a consistent workable and equitable whole, which was what this Court was seeking to accomplish.

If the present opinion of this Court is permitted to stand unmodified, it will result in a heart-breaking situation generally. The maritime law is generally recognized as the most liberal of all laws for injured employees and it serves as a pattern for legislators everywhere. In England a study of the Compensation Act was made, with the result that it was found to be entirely inadequate, and a new remedy was adopted in 1947 which makes the compensation law simply an auxiliary to the right to recover damages. The present English law is now patterned after our own maritime law. It would indeed be most unfortunate if we should fail to recognize the wholesome character of our own maritime law and initiate its disintegration by an extension of the proven inadequate compensation laws.

The result which this Court desires can be achieved simply by taking away the right to an election but leaving intact the enjoyment of the present maritime rights. This construction would be compatible with the plain meaning of the language in the Compensation Act and in the 1949 amendment to that Act, and with the language of the Public Vessels' Act.

WHEREFORE it is respectfully urged that this Court grant a rehearing in the above-entitled matter and that the National Association of Claimants' Compensation Attorneys be granted the privilege of filing a brief as amicus curiae.

Respectfully submitted,

NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS,

By SAMUEL B. HOROVITZ,

Attorney.

Certificate of Counsel.

I, Samuel B. Horvitz, hereby certify that this petition is presented in good faith and not for delay.

SAMUEL B. HOROVITZ,
Attorney for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 414

SAMUEL MANDEL, Administrator of the Estate of Robert Willie Dillehay, Jr.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF A PETITION FOR A REHEARING.

BELLI, ASHE & PINNEY,
MELVIN M. BELLI,
LOU ASHE,
VAN H. PINNEY,
240 Stockton Street, San Francisco 8, California,
Amici Curiae.

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PETITION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF A PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Petitioning counsel were informally advised on May 28, 1952 of this Honorable Court's decision of

May 26, 1952 in the case at bar. On this latter date, Abraham E. Freedman, Esquire, Philadelphia, Pennsylvania, counsel for petitioner, graciously granted his consent, via long distance telephone, to these petitioning counsel, for permission to file *amici curiae* brief supporting petitioner herein.

On May 29, 1952, Leavenworth Colby, Esquire, Special Assistant to the Attorney General of the United States and one of counsel for respondent, was contacted by long distance telephone. Although not disposed to granting his consent, he did state considerately that "there is no objection" to the filing of *amici curiae* brief.

Since the exigencies of time offered little alternative in the matter of procuring consent of counsel and of this Honorable Court for leave to file brief *amici curiae*, we respectfully request this Honorable Court's gracious consideration of our petition notwithstanding the inability of counsel to approach the Court with stricter formality.

We are counsel for six libelants in the following named cases, tried in the District Court of the United States for the Northern District of California, Southern Division: *Kaye v. United States*, No. 25123-G; *Quimpo v. United States*, No. 25083-R; *Starkey v. United States*, No. 25266-R; *Webb v. United States*, No. 25413-R; *Gerardo v. United States*, No. 25081-G; and *Key v. United States*, No. 25267-H. (This latter case on appeal to the Circuit Court of Appeals for the 9th Circuit.)

In each of these cases, libelants are the legal representatives of the estates of deceased American seamen, who lost their lives on November 24, 1947, while serving aboard the United States Army Transport *Clarksdale Victory,* operated by the respondent United States of America. The deaths of these seamen were found by the Court to have occurred by reason of the negligence of the respondent United States of America, and various awards were made.

We also represent libelant James C. Gibbs, in *Gibbs v. United States of America,* 94 F. Supp. 586, wherein the Court affirmed the right of a Federally employed *shoreside worker* to elect his remedy and proceed under the Public Vessels Liability Act. Libelant's appeal followed the Court's finding that Gibbs, in accepting hospitalization benefits, had *elected* to proceed under the FECA. This case is now before the Circuit Court of Appeals for the Ninth Circuit and was cited in the minority opinion in the case at bar.

All of the above cases are seriously affected by this Honorable Court's decision in the case at bar. Therefore, the undersigned counsel are directly and deeply interested in having this Honorable Court reconsider this case.

Melvin M. Belli, Esquire, of the firm of Belli, Ashe & Pinney, San Francisco, California, is duly admitted to practice before this Honorable Court; petitioners Lou Ashe and Van H. Pinney are members of the aforesaid firm.

Wherefore, petitioners pray leave of this Honorable Court to file the accompanying brief *amici curiae* on behalf of the petitioner Mandel in the above-entitled matter.

Dated, San Francisco, California,
June 6, 1952.

Respectfully submitted,

BELLI, ASHE & PINNEY,
MELVIN M. BELLI,
LOU ASHE,
VAN H. PINNEY,
Amici Curiae.